Counsel for the First Parties—Chree, K.C. —A. R. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Second Parties—Dean of Faculty (Scott Dickson, K.C.)—Aitchison. Agents—Macpherson & Mackay, S.S.C.

Friday, February 5.

FIRST DIVISION.

[Sheriff Court at Linlithgow.

NICOL *v.* YOUNG'S PARAFFIN LIGHT AND MINERAL OIL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Beginning of Employment.*

A workman who was employed as a fanman in the spirit recovery department of certain oilworks, and whose duties were exclusively confined to that department, was proceeding to his work by a path alongside a switchback lye belonging to the oilworks when he strayed on to the lye and was run over by a waggon and killed. On both sides of the path at the point where his body was found were refuse bings and sidings belonging to the works, but the nearest of the buildings belonging to the works was 80 yards further along the path, and the deceased's working-place was 330 yards away.

Held (*rev.* decision of arbitrator) that the accident arose out of and in the course of the employment within the meaning of the Workmen's Compensation Act 1906.

Margaret Harrison or Nicol, residing at Kirkhill Park, Broxburn, widow of David Nicol, fanman, (1) as an individual and (2) as tutrix for Agnes Nicol, a pupil child of her marriage with the said David Nicol (hereinafter called the deceased), and John Nicol and Margaret Nicol, minor children of the said marriage, *appellants,* claimed in the Sheriff Court at Linlithgow compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Young's Paraffin Light and Mineral Oil Company, Limited, 7 West George Street, Glasgow, *respondents,* and being dissatisfied with the determination of the Sheriff-Substitute (MACLEOD) appealed by Stated Case.

The Case stated:—"The appellants and the respondents were agreed that if the appellants were entitled to an award the amount thereof should be £295, 7s. . . . . .

"IV. The following *facts* were admitted or proved:—1. The appellants are respectively the widow and children of the deceased, and at the time of his death they were all wholly dependent on the earnings of the deceased, with the exception of John Nicol, who was only partly so dependent.

"2. The deceased was a fanman for the spirit recovery department of the respondents' oil works (hereinafter called 'the works'). In the works the respondents carry on the business of manufacturing oil and other products from shale. The works consist of a shale breaker (which is situated at the west end of the works), retorts, condensers, naphtha treating houses, fan engine house, and various erections for the spirit recovery department (which last-named department is situated at the east end of the works). Between the shale breaker at the west end of the works and the spirit recovery department at the east end of the works there is a distance of 250 yards.

"3. The duties of the deceased in the employment of the respondents were entirely limited to the spirit recovery department at the east end of the works, and his employment on any particular shift did not begin until he had reported himself to and taken over charge from the fellow-workman whom he was to relieve. It was the deceased's duty to report himself to his fellow-workman for this purpose at the hour when his shift began in the bothy within the said spirit recovery department.

"4. The works are bounded on the north by a very extensive spent shale bing, on the east by the fields of Loaninghill Farm, and on the south by the North British Railway (Bathgate section). The boundary of the works on the north-west (which is the part under special consideration) is not capable of such exact definition, but the environment of the works on their north-west side will be described in later paragraphs.

"5. From their respective homes the men employed by the respondents in the works journey thereto by various routes. Only three of these routes need be mentioned, viz.—(1) A route from Broxburn across the fields of Loaninghill Farm, which gives access to the works on their east side. This was the shortest route for the deceased (being about 1¾ miles) from his house in Kirkhill to his working-place in the works, and he generally adopted it, using a hand-lamp to light him across the fields, but as the night libelled was wet and stormy he did not proceed to the works by this route, though he took his hand-lamp with him, unlighted, in case he might desire it for use across the fields on his way home in the darkness of the following morning. This route was quite free from any danger connected with the operations of the respondents till a workman had actually entered the works; (2) the public road from Uphall Village to Uphall Station. This is a very convenient route for the workmen who live at the west end of Uphall, but was somewhat circuitous for the deceased, who would have had to travel the whole length of the public road from Broxburn to Uphall, making his journey from his home to his working-place 2½ miles; whereas (3) a private road (herein called the 'Access Road') enabled the deceased, travelling along the public road from Broxburn towards Uphall, to leave the said public road at a point considerably short of Uphall Village and reach his working-place in the works by a journey which was somewhat less than 2 miles from his house (1 mile 58 chains to be exact), and

this saved him fully ½-mile as compared with the route described in the immediately preceding No. (2).

"6. The said three routes (and others) were all regularly used by the men employed by the respondents at the works, with the knowledge of the respondents, and without their prohibition, but in connection with every route of access to the works, except the one across the fields of Loaninghill Farm, the respondents had a notice board giving the following warning:—'This road is private property, and all trespass thereon is strictly prohibited. Any persons making use of it will do so at their own risk. Young's Company will not be liable for any accident arising from their traffic.'

"7. On the night libelled the deceased travelled towards the works by the Access Road. The following are details connected with the Access Road:—

"(1) The solum of the Access Road is the property of the North British Railway Company, and is rented by the respondents for a nominal way-leave in order that those of their workmen for whom it is convenient may have a comfortable route of access to the works. It varies in breadth from 10 feet to 8 feet, and in its whole breadth it is maintained by the respondents as a well-beaten pathway suitable for bicycles.

"(2) The Access Road proceeds southwards from the Broxburn-Uphall public road till it reaches a point 14 yards south of the shale breaker at the west side of the works, and then turns at an obtuse angle to the east across six lines of rails, which are banked up with ashes to facilitate passage across these lines.

"(3) The total length of the Access Road from its junction with the Broxburn-Uphall public road to the said obtuse angle is about 1160 yards.

"(4) The respondents being of opinion that the said warning on the notice board gives them all the protection from liability that they desire, permit the Access Road to be used by the general public, and it is in regular use by large numbers of the general public to and from Broxburn, and Uphall on the north, and Uphall Railway Station, Station Rows, Beechwood Cottages and Pumpherston Village on the south. The respondents' workmen and the general public travel along the Access Road from its junction with the Broxburn-Uphall public road together as far as the said obtuse angle.

"(5) All persons, whether the respondents' workmen or the general public, are, while travelling south along the Access Road, distinctly outside the works till they reach the said obtuse angle, but on the other hand there is on each side of the Access Road, at that part thereof adjoining which the dead body of the deceased was found, land occupied by the respondents as adjuncts or excrescences of the works, as more fully detailed in the various sub-paragraphs of paragraph (7) hereof.

"(6) Under the after-narrated circumstances the dead body of the deceased was found on the after-described switchback lye adjoining the Access Road, at a spot which was about—1. 94 yards north (*i.e.*, 94 yards short) of the said obtuse angle; 2. 330 yards from his working place; 3. half-way along the said switchback lye.

"(7) The environments of the Access Road are as follows:—

"(*a*) At a point a few yards south of its junction with the Broxburn-Uphall public road the respondents had erected a notice board with the warning which is set forth in paragraph IV, 6, hereof. The said notice board was not erected by the respondents as a boundary mark, and it is not in fact a boundary mark. The object of the respondents in erecting it was to give to intending users of the Access Road the earliest possible notice of the respondents' views concerning legal liability in the event of accident arising from their traffic.

"(*b*) Travelling south of the Access Road there is a substantial stob and wire fence on the west side thereof along its whole length from its junction with the Broxburn-Uphall public road to the shale breaker (which is 14 yards north of the said obtuse angle). There is a similar fence on the east side of the Access Road, but on the east side the fence only extends for some 661 yards from the northern point where it begins. Thereafter the Access Road is bounded on the east for 317 yards by an extensive bing of spent shale removed thither by the respondents from the works, and thereafter for the remaining 170 yards of its length by a switchback lye used by the respondents for empty waggons; and for the safe working of the traffic on the said switchback lye it is not practicable to fence the Access Road along the course of the said switchback lye, because the Access Road is used by the respondents' brakesmen when coupling waggons.

"(*c*) Travelling south on the Access Road there is on the west side thereof no land in the occupation of the respondents from the junction of the Access Road with the Broxburn-Uphall public road for a distance of 361 yards, but from that point the respondents' Main Service Uphall-Hopetoun Railway runs alongside the whole remaining length of the said fence on its west side to the said shale breaker. Westwards from the point where the deceased's body was found the land immediately adjoining the Access Road is occupied by the respondents for the following purposes (mentioning them in their order westwards), viz.—(*a*) for the said fence; (*b*) for the said Uphall-Hopetoun Railway; and (*c*) for various sidings and bings. The respondents use their said Uphall-Hopetoun Railway for the conveyance of green shale, crude oil, and other traffic from the Hopetoun mines to the works, a distance of 3 or 4 miles.

"(*d*) Travelling south on the Access Road there is on the east side thereof no land in the occupation of the respondents from the junction of the Access Road with the Broxburn-Uphall public road for a distance of 661 yards, but from that point the land on the east side of the Access Road is (as already stated in paragraph (7) (*b*) hereof) occupied by the respondents for a distance of 317 yards for an extensive spent shale bing.

From the point in the Access Road where the said shale bing ceases to be a boundary of the Access Road to that part of the Access Road which adjoins the spot where the body of the deceased was found, the Access Road is bounded on the east side by a narrow piece of ground (belonging to the North British Railway Company and leased by the respondents) which is hemmed in on the north and on the east by the said extensive spent shale bing. The said narrow piece of ground is occupied by the respondents for the following adjuncts or excrescences of the works, viz.—(1) Immediately bounding the Access Road on its east side is the said switchback lye, (2) to the east of the said switchback lye is a low refuse coal bing, (3) to the east of the said refuse coal bing is a full waggon siding, and (4) to the east of the said full waggon siding are two shale breaker sidings. The said narrow piece of ground lies entirely outside the works and to the north-west thereof.

"(*e*) Notwithstanding the absence of a fence on the east side of the Access Road along the course of the said switchback lye there is no danger thereby caused to any user of the Access Road who is ordinarily heedful to where he is going. Even on the darkest night it is easy for a passenger southward bound to see the fence on his right hand side. Some diffused light is thrown on the Access Road where it adjoins the said switchback lye by a powerful Lucigen lamp within the works, and there is a flare lamp in the shale breaker which also throws light on the Access Road at the same part. If one stares straight at the shale breaker lamp from a point near it its light will dazzle and blind the one who stares, but to any person of ordinary vision who is travelling along the Access Road beside the said switchback lye the shale breaker lamp will give a satisfactory though not a perfectly steady light.

"(*f*) Though the vicinity of the said switchback lye to the Access Road creates no danger to one who is ordinarily heedful, it is nevertheless possible for one who is paying no heed to his course to leave the Access Road and put his foot or feet between the rails of the said switchback lye, because though in most places the top of the rail is above the level of the Access Road, yet there are places where at times the surface of the ground on each side of the rail is practically flush with the top of the rail.

"(*g*) The deceased has frequently travelled by the Access Road and was well acquainted with all its features, two of those features being (1) that during the night shift there were waggons in motion on the switchback lye, and (2) that no lamp was needed for safety of travelling by a user of the Access Road. The Access Road in the vicinity of the spot where the deceased's body was found has a very gentle slope downwards from the fence on the west of the Access Road for about half its breadth. The other half of its breadth, *i.e.*, the half nearest the said switchback lye, is practically level.

"8. On the night libelled (28th November 1913) the deceased left his home in apparently perfect health a little after nine o'clock (that being his usual time when on the night shift) dressed for his work and with the intention of proceeding to his work, which he was due to begin at ten o'clock. He was a particularly regular workman. The distance from the deceased's house to his place of work was (as hereinbefore narrated) somewhat more or somewhat less than 2 miles, according to the route which he might select.

"9. The deceased was last seen alive between 9·40 and 10·15 o'clock on the night libelled. (The evidence does not permit a more definite finding on this point.) He was then proceeding westwards along the Broxburn - Uphall public road towards its junction with the Access Road. He was then quite sober. He had passed the last public-house on his way between his home and his working-place by the Access Road, and there is no reason to suppose that he partook of strong drink later. To the last person to whom he spoke he mentioned that he was going to take the Access Road to his work that night. From the point at which he was last seen alive he could easily have reached his working-place in ten or fifteen minutes, but he did not reach his working-place that night, and there is no further history of what he did, where he went, or what happened to him until 8·45 o'clock next morning.

"10. About 8·45 on the morning after the night libelled, when the men in charge of one of the respondents' locomotives were proceeding to remove empty waggons (each weighing seven tons when empty) from the said switchback lye, their attention was attracted by the rising of the wheel of one of the said waggons, and they discovered that the obstruction was due to the deceased's body, which was then quite cold. The said locomotive caused one wheel of each of two waggons to pass over the deceased's body, but before either of the said two waggons had been put in motion by the said locomotive the deceased had been dead for at least two or three hours, and his body had been lying underneath a waggon and between the wheels thereof in the following position, namely, partly on back and partly on right side, head resting on the coal bing immediately to the east of the said switchback lye, and feet in between the rails. There was no reason to suppose that the position of the body had been altered from the time that the deceased was first injured. The position of the body, the injuries on the body, and the position of the deceased's cap and lamp were all quite consistent with his having been knocked down while still alive by the buffer of a waggon, and having been flung where his body was found, and thereafter having been severely crushed; but, on the other hand, it is possible that the whole injuries found on his body may have been caused by the waggons which passed over his body after his death.

"11. A medical man arrived on the scene within an hour after the said finding of the deceased's body. He found that the left arm had been broken and nearly severed, and that the crushing of the body had been

so severe that the lung was protruding from the mouth, but not foreseeing the various questions that have arisen, the examination which he made did not enable him to testify whether *rigor mortis* had or had not set in when he saw the body, neither could he testify whether the injuries which he saw had been inflicted after death or during life, but if the injuries which he saw had all been sustained during life, they must have caused practically instantaneous death.

"12. On the night shift it is a regular experience that unattended or empty waggons are in fairly rapid motion by gravity down the said switchback lye towards its northern or dead end—*i.e.*, meeting any user of the Access Road who is southward bound. On the night libelled there were no waggons in motion along the said switchback lye between 11 p.m. and 8·45 a.m. which could have injured the deceased, but between 9·30 and 11 o'clock on the night libelled there were waggons in motion on the said switchback lye, and it is possible that during the hours last mentioned on the night libelled a person who stepped off the Access Road on to the said switchback lye might be knocked down by a moving waggon without the knowledge of the workman who set the waggon in motion.

"13. The coal bing on which the deceased's head was found resting was of such a nature as to make it very unlikely that the deceased could by a slip or a slide have got into the position in which his body was found.

"On the foregoing facts I reached the following *conclusions in law:*—1. With some hesitation I drew the inference that the deceased while proceeding from his home to his work by the Access Road in a heedless moment accidentally left the Access Road about 10 o'clock on the night libelled and was thereupon knocked down and fatally injured by a waggon in motion on the said switchback lye. As I was dealing with the case of a workman who was (1) sober, (2) in good health, and (3) regular at his work, it seemed to me my duty to disregard the theories to the contrary of the inference which I drew, that were presented to me, for they scarcely attained even to the dignity of possibilities. 2. I regarded the deceased as a man who was lawfully pursuing a route of his own selection from his home to his work under conditions identical as to possibility of injury with those of any member of the general public pursuing the same route, and who (on an application of the tests supplied by *Graham* v. *Barr & Thornton*, 1913 S.C. 538, 50 S.L.R. 391) was fatally injured before he had reached the 'margin of his employment.'

"Accordingly I decided that the accident to the deceased had not arisen out of and in the course of his employment with the respondents, and I assoilzied the respondents, with expenses."

The *question of law* for the opinion of the Court was—"Was I right in deciding that the accident to the deceased did not arise out of and in the course of his employment with the respondents?"

Argued for the pursuer—The deceased was killed by accident arising out of and in the course of his employment. Employment did not begin only when the workman took up his tools, nor did it cease as soon as he laid them down. A reasonable "margin both of time and place" must be allowed for reaching the place of employment or going from it, within which the workman was in the course of his employment. If the workman had reached the "precincts of the works," as here, he was within that margin—*Graham* v. *Barr & Thornton*, 1913 S.C. 538, 50 S.L.R. 391, *per* Lord President (Dunedin); *Cross, Tetley, & Company* v. *Catterall*, 116 L.T. 261, referred to in *Sharp* v. *Johnston & Company, Limited*, [1905] 2 K.B. 139, at p. 145; *Gane* v. *Norton Hill Colliery Company*, [1909] 2 K.B. 539, *per* Cozens Hardy, M.R., at p. 544; *Mackenzie* v. *Coltness Iron Company, Limited*, October 21, 1903, 6 F. 8, 41 S.L.R. 6; *Jackson* v. *General Steam Fishing Company, Limited*, 1909 S.C. (H.L.) 37, 46 S.L.R. 901; contrast *Hendry* v. *United Collieries, Limited*, 1910 S.C. 709, 47 S.L.R. 635. The deceased was using a means of access provided by the employers, and while going to work by it was within the course of his employment—*Cremins* v. *Guest, Keen, & Nettlefolds, Limited*, [1908] 1 K.B. 469; *Mole* v. *Wadworth*, 1913, 6 B.W.C.C. 129. The Sheriff was wrong in holding that the employers' premises were the buildings only, and it was clear from the findings in fact that the accident occurred within the employers' premises and in the course of the employment.

Argued for the defenders—The question in this case was one of fact, and the Sheriff was entitled to find as he did. It was for him to say where the premises began. This case was similar to *Graham* v. *Barr & Thornton* (*cit.*); *Caton* v. *Summerlee and Mossend Iron and Steel Company, Limited*, July 11, 1902, 4 F. 989, 39 S.L.R. 762; *Anderson* v. *Fife Coal Company, Limited*, 1910 S.C. 8, 47 S.L.R. 3. The deceased was not using a means of access the use of which was a term of the contract of employment, as in *Cremins* v. *Guest, Keen, & Nettlefolds, Limited* (*cit.*), or which was the only way to the works, as in *Mold* v. *Wadworth* (*cit.*). He had taken one of several roads which were available, and was not within the course of his employment—*Davies* v. *Rhymney Iron Company, Limited*, 1900, 16 T.L.R. 329; *Gilmour* v. *Dorman, Long, & Company, Limited*, 1911, 4 B.W.C.C. 279; *Walters* v. *Staveley Coal and Iron Company*, 1911, 49 S.L.R. 623, 4 B.W.C.C. 303; *Williams* v. *Sir C. G. A. Smith*, 1913, 6 B.W.C.C. 102. Even if the accident arose in the course of the employment, it did not arise out of it—*Biggart* v. *Owners of s.s. "Minnesota,"* 1911, 5 B.W.C.C. 68; *Kitchenham* v. *Owners of S.S. Johannesburg*, [1911] A.C. 417, 49 S.L.R. 626.

At advising—

LORD PRESIDENT—We have before us here an exceptionally careful and detailed statement of the facts found proven by the learned arbitrator. On these facts so found I come to the conclusion that the accident which befell the appellant's husband and caused his death was one arising out of and in the course of his employment.

I shall summarise briefly the facts which in my view are material to the issue. The appellant's husband was a fanman employed in the spirit recovery department of Uphall Oil Works. His duties were confined exclusively to that department. On the night of the 28th November 1913 he was proceeding to his work from his home some two miles off when he accidentally strayed on to a switchback lye, close beside the road, where he was run over by a waggon and fatally injured. These are inferences in fact drawn, I think, quite correctly by the arbitrator. The road on which the deceased was walking to his work was a private road, made on land rented by the oil works from the railway company. It was maintained by the employers, and was provided by them for the use of their workmen in going to and coming from their work. Close alongside the road, on the west side, there was a large bing of spent shale from the oil works, extending 370 yards. At the end of the bing commenced the switchback lye which extended for 170 yards, both alongside the roadway. There was no fence between the switchback lye and the roadway. Fencing, it appears, was impracticable, because the lye was used for empty waggons, and the brakesman employed to couple the waggons had to use the road. Accordingly, the risk which the workman ran was one apparently incidental to his employment. His dead body was found about 85 yards up the switchback lye, on the left-hand side of the road. On the right-hand side going up the road was land rented by the oil works, and occupied by them as bings and sidings.

The accident occurred at the place I have mentioned. The question is, did it arise out of and in the course of the man's employment? I think it did, for it is now well settled law that an accident arising out of and in the course of a man's employment may befall him before he has actually reached the place at which he is engaged to work, when he is on his way to that place or is leaving that place. The circumstances will determine whether or no the accident arose out of and in the course of his employment; but a man may be within the scope and sphere of his employment even although he is not actually engaged at his working-place, as was laid down by Lord Justice Farwell in the case of *Gane* v. *Norton Hill Colliery Company*, [1909] 2 K.B. 539, which was cited to us. His Lordship says—"It is well settled that the employment is not confined to the actual working, whether in a pit or at any other trade, in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes connected with his work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service." That opinion appears to me to describe with perfect accuracy the scope and sphere of the workman's employment in the case before us, for he was entitled to be there—employed to be on his master's premises on this road for the purpose of getting to and from his work. Indeed, I regard the reasoning of all the learned Judges in the Court of Appeal, and the decision itself in the case of *Gane*, as directly in point, and although not binding upon us I think it is an authority which we ought to follow.

But the learned arbitrator came to the opposite conclusion, apparently on three grounds—(1) he regarded the deceased as a man who was lawfully pursuing a road of his own selection from his home to his work. I cannot think so. It is nothing to the purpose to say that there was more than one road which he might have taken from his home to his work so long as it is quite clear, as it is in the present case, that the road he was using was one provided by his employer for the use of the workmen, and certainly recognised aud permitted. As Lord Justice Kennedy observed in the case I have just cited—"I do not think it matters whether there were three ways or twenty ways if they were all ways by which the workman, faithfully doing his duty to his employer, would with that employers' knowledge be entitled to go." That seems to me to apply directly to the present case, for assuredly the workman was using a road expressly provided for his use at the time when the accident befell him, and therefore I think any risk incidental to the use of that road was a risk which he ran within the sphere and scope of his employment. (2) The learned arbitrator thought that the workman in proceeding along this road was "under conditions identical as to possibility of injury with those of any member of the general public pursuing the same route." I cannot think so, for it is nothing to the purpose to say that the employers did not turn the public off this private road which they provided and maintained for the use of their workpeople, so long as it was not a public road which any member of the public was entitled without leave of the employers to use. I consider that although the public were permitted by the employers to use the road, nevertheless it was a road provided expressly for the workpeople, and one on which, therefore, if an accident occurred, the accident arose out of and in the course of the employment. Lastly, the learned arbitrator says that he considers the man was "fatally injured before he had reached the 'margin of his employment.'" "The margin of his employment" is an expression, of course, not to be found in the Act of Parliament, but employed by a learned Judge in the Court of Appeal in England. What I understand it to mean in the present case, in the view of the learned arbitrator, is nothing other than the premises of the employer, and I observe that in the course of his findings the arbitrator confined the description or definition of works to the actual erections upon the ground. I consider that to be far too narrow a definition of works regarded as

premises. I am very far from saying that any judge ought to lay down any definitions or descriptions or tests as absolutely conclusive under this statute, and I am not going to attempt to define what I mean by premises, or even to say that if the workman was on the premises that is a test universally applicable. But wherever a workman is actually going to his work upon a road provided by his employer, or recognised and permitted by his employer, and is actually within the premises, an accident befalling him is, in my opinion, an accident arising out of and in the course of his employment.

Something very like that appears to have been decided in the House of Lords in the case, not reported, of *Cross, Tetley, & Company, Limited* v. *Catterall*. In that case the highest Court seems to have regarded the workman's presence within the premises, and on a road recognised by the employers, as a fairly good rough and ready test as to whether or no he was within the scope and sphere of his employment at the time when the accident befel him. It is regrettable, I think, that that case has not been fully reported in the authorised reports, but so far as I can judge from the summary of it given in the opinion of the Master of the Rolls in the case of *Sharpe* v. *Johnston & Company*, 1905, 2 K.B. 145, and in an abridged form in the Law Times report, it appears to me to be directly in point. As reported in the latter publication the case seems to have been of this description —"Where a miner was injured by slipping on a bridge which he was crossing to go to work, the bridge being about 158 yards from the lamp-room, and about 100 yards from where he would work in the mine, and having been constructed by the respondents, the employers having given leave to enter the premises that way, although there was another way further round, the accident was held to have occurred in the course of his employment." If that is an accurate report, then the case appears to me to be directly in point and otherwise to be sound and unassailable in its reasoning.

For these reasons I am of opinion that the learned arbitrator has not reached a right conclusion in this case, and, accordingly, that we ought to answer the question put to us in the negative.

LORD JOHNSTON—In the present case we are enabled by means of the plans to which the Sheriff has very properly referred, and indeed made by reference part of his statement of the facts of the case, to understand these facts in a way in which we could not otherwise have done. The deceased David Nicol was employed in Young's Paraffin Works. The precise work which he was engaged to do was attending a fan in the spirit recovery department situated at the east end of the works, and as much as 250 yards from the shale breaker at the west end of the works. Young's Paraffin Works are not such an establishment as one expects to find in a town or populous district, built on a plan, surrounded and separated from other premises by a wall or other fence, approached by road or street, and entered by a definite gateway. They are situated in open country, and are approached by three different means of access, none of them public roads. One of these, which the Sheriff calls the "Access Road," is a private road leaving the public road from Broxburn to Uphall at the west end of Uphall village, and running directly south to Young's Works about 1160 yards distant from the high road. This was on the night in question, which was wet and stormy, the natural and proper route for the deceased to take to his work, though there was a shorter road by a path through fields. After leaving the high road the Access Road crosses agricultural ground for about 350 yards till it meets a mineral railway line at an angle. Whether this line is a private one or not I do not know, and it is immaterial. It runs from the Hopetoun mineral field to Young's Works, and also gives Young's Paraffin Company a connection with the North British Railway at Uphall Station, a little to the south of the works. It may belong to the North British Company, and is at anyrate worked by that company, but Young's own men attend to the sidings and lyes. After meeting the mineral railway the Access Road runs along the east side of the line till it reaches a point where a large bing of spent shale thrown out from Young's Works abuts upon the line on the east. It then continues along the east side of the line, and between the line and the bing, till it reaches a point where the line connects on both sides with a number of sidings belonging to Young's Works, from which point it continues, still along the main line of rails but among the sidings, until it reaches the back or west side of the shale breaker. There, so far as an access to the works, it may be said to stop, although crossing the sidings it continues as a footpath towards Uphall Station. I do not understand that Young's Company have any concern with it beyond their works. We are told that the *solum* of the Access Road is the property of the North British Railway Company, and that it is rented by Young's Company for a nominal wayleave "in order that those of their workmen for whom it is convenient may have a comfortable route of access to the works." It is from 8 to 10 feet wide, and is maintained by Young's Company as a well-beaten pathway for bicycles. Where it turns the corner of the shale breaker and crosses the lines of rails, including the sidings, as many as six in number, it is banked up with ashes to facilitate passage. Starting from its junction with the high road, the road of access is fenced on its west side with a stob and wire fence the whole way to the shale breaker. It is also similarly fenced on the east side till it reaches the shale bing. For the last 500 yards there is nothing to separate it, first, from the tailings of the shale bing, and then from a switchback lye inserted between it and the shale bing, which is used by Young's Company for empty waggons. It could not be fenced from said lye consistently with the conduct of the company's business.

On 28th November 1913 Nicol took the Access Road in order to enter on his work

on the night shift. He was last seen alive about ten o'clock proceeding to the junction of the public road and the Access Road. His dead body was found next morning at a spot on the switchback lye above referred to about half-way between its dead end and the shale breaker, and there could be no doubt that a railway truck or trucks had passed over him and inflicted fatal injuries. While his body was found about 80 yards from the shale breaker, it was about 350 yards from the spot where he was personally engaged to work. I mention this distance because the Sheriff has been led to the conclusion on, I think, a misapplication of the case of *Graham* v. *Barr*, 1913 S.C. 538, that the deceased met with the injury which cost him his life before he had reached the "margin of his employment," and accordingly decided that the accident to him had not arisen out of and in the course of his employment, and assoilzied his employers from the claim of his widow and children.

I think that the Sheriff has misapprehended the bearing on the question of liability in such cases of the fact of the *locus* of the accident being within the premises, however the premises may be defined, of the employer. He has, I think, taken a question which is merely a guide or assistance in determining the main question for the main question itself. It has been repeatedly pointed out that the true question for the arbitrator is whether injury is caused to a workman by accident arising out of and in the course of his employment. There are many incidental questions the solution of one or more of which may aid the solution of that which is the true question. One of these is, did the accident occur within the employers' premises? But the answer to this question is not the end of the matter. The accident may have so occurred, but yet in the circumstances no liability ensue, because the accident has not occurred in the course of or arising out of the employment. In fact I think that the Sheriff has confined himself too much to the consideration of the *locus* of employment, in the sense of working-place, and has not considered the employment in its wider sense.

I think that the present question is properly solved by the following considerations:—The term employment used in the statute is open to construction; it is not limited to the mechanical operation which the workman is employed to perform, nor confined to the buildings in which, or the spot at which, he performs it, but has a wider significance varying with the circumstances of each case. I cannot better state what I believe to be the law than by quoting Farwell, L.J., in the case of *Gane* v. *The Norton Hill Colliery Company*, [1909] 2 K.B. 539—"It is well settled that the employment is not confined to the actual working, whether in a pit or in any other trade in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes. . . . All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way." One thing which the workman is entitled to do by virtue of his contract of employment is to come on to his employer's premises in order to reach the *locus* of his special work. A corresponding obligation to give him access lies on the employer. But the extent of that obligation will depend entirely upon circumstances, and on the extent of that obligation may depend the question of whether an accident arises out of or in the course of his employment. If a high road brings the workman to his employer's gate, the passing along the high road is not by virtue of his contract of employment, and the workman cannot be said to be in his master's employment, at anyrate until he enters the gate. Where a private road of access such as the present has by reason of the circumstances to be provided for the workmen, I am not prepared to say that the position is necessarily any different. That is not the question here. When an accident to a workman occurs on the access road, between the high road and the shale bing, it will be time enough to consider it. The question in this case is, whether, when the workman had reached a point on a route which he was entitled to take, at which he was within the zone of the operation of his master's works, he had so reached a point at which he was doing that which he was entitled to do by virtue of his employment, quite irrespective of the question of the perimeter of the works proper, or of the distance from the *locus* of his own special working-place. The question is one of circumstance, but having regard to the nature and disposition of the works of Young's Paraffin Company, I think that this question must here be answered in the affirmative, and that consequently the accident in question occurred in the course of the deceased's employment. If so, having further regard to the nature of the accident, I have no doubt that it also arose out of as well as in the course of the deceased's employment. In coming to this conclusion I do not think that we decide anything inconsistent with the judgment in the cases of *Caton*, 4 F. 989, and *Graham* v. *Barr*, *&c.*, though there are some expressions in the opinions of the Judges who decided the former case which, if taken literally and divorced from their context, might be misleading.

LORD SKERRINGTON—I concur.

LORD MACKENZIE was sitting in the Extra Division.

The Court answered the question of law in the negative.

Counsel for Pursuers and Appellants—Anderson, K.C.—Patrick. Agent—T. M. Pole, Solicitor.

Counsel for Defenders and Respondents — Roberton Christie, K.C. — MacRobert. Agents—R. & R. Denholm & Kerr, Solicitors.

Thursday, February 18.

SECOND DIVISION.

RANKINE *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Acquiescence—Discontinuance of Compensation without Workman taking Proceedings—Personal Bar.*

A colliery company for some time paid compensation for total incapacity to a miner who had sustained an injury to his back. The miner having partially recovered, the amount of the payments was reduced by agreement, although no memorandum of agreement as to either full or partial compensation was recorded. Later on the company ceased payment altogether. Thereupon the miner's agent wrote to the company's agents demanding the continuance of the partial compensation and threatening proceedings, but although the company's agents replied refusing to admit further liability on the ground that the miner's condition was no longer due to the accident, no proceedings were at that time taken by the miner, and no further communications passed between the parties or their agents until more than a year later, when the miner's agent wrote to the company's agents stating that he was totally incapacitated. In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, after a proof, awarded the miner partial compensation for the intervening period. The arbitrator found that the miner had "never fully recovered from the result of said accident and had never returned to work," and "continued partially incapacitated" until he "again became totally incapacitated on account of spinal sclerosis resulting from the accident." He also found that "there was no evidence indicating that the (company's) position had been in any way altered by the delay in taking proceedings for the enforcement of compensation," and the spinal sclerosis "was not diagnosed until within six months of the date of the proof, and the evidence disclosed nothing during the period between" the time when the miner threatened proceedings and the time when the disease was diagnosed, "ignorance of which could have caused prejudice to the company." In a stated case the company pleaded that the miner had acquiesced in the company's refusal to pay compensation, and was personally barred from claiming it.

The Court *held* that on the facts found by the arbitrator he was entitled to make the award.

Observations on the effect of delay in enforcing claim for compensation.

Lochgelly Iron and Coal Company, Limited v. *Sinclair*, 1909 S.C. 922, 46 S.L.R. 665, *distinguished.*

The Fife Coal Company, Limited, *appellants*, and Andrew Rankine, miner, Cowdenbeath, *respondent*, brought, in the Sheriff Court at Dunfermline, an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap 58), in which the Sheriff-Substitute (UMPHERSTON) awarded compensation and stated a Case for appeal.

The Case stated—"This is an arbitration in an application for an award of compensation under the Workmen's Compensation Act by the respondent in respect of personal injury sustained by him by accident arising out of and in the course of his employment with the appellants as a miner in their No. 10 Pit, Kirkford, Cowdenbeath, on 8th April 1910, in consideration of which he had been paid certain compensation by appellants. In his application respondent claimed to be awarded partial compensation at 7s. 2d. per week from 31st August 1912 to 7th February 1914, and thereafter full compensation at 15s. 8d. per week until the further orders of the Court. The claim was resisted by the appellants on the ground that respondent's incapacity resulting from the accident came to an end at or prior to 31st August 1912, and that any incapacity then remaining was due to respondent's failure to engage in light work or in appropriate exercises. The appellants further pleaded that respondent's total incapacity for work as at the date of coming into Court (which was admitted) was caused by spinal sclerosis arising from natural causes unconnected with the accident, and that respondent had acquiesced in the non-payment of compensation between said 31st August 1912 and the raising of the proceedings (20th March 1914).

"Proof was heard before me on 8th June 1914, and upon 24th June 1914 I found the following *facts* admitted or proved:—(1) That on 8th April 1910 respondent, who was a miner in No. 10 Pit, Cowdenbeath, belonging to appellants, sustained injury to his back by accident arising out of and in the course of his employment. (2) That his weekly wage prior to the accident was 31s. 4d. (3) That by agreement between the parties respondent was paid compensation at 15s. 8d. per week down to 24th February 1911, when he was certified by the medical referee to be fit for light work. (4) That respondent was thereafter paid and accepted partial compensation at 7s. 2d. per week until 31st August 1912, when appellants ceased payment. No memorandum of agreement as to either full or partial compensation was recorded. (5) That on 9th October 1912 respondent's agents wrote appellants' agent demanding the continuance of partial compensation and threatening proceedings, and that on 21st October