actual payment of their shares. When a testator prescribes such a scheme as that it is the duty of the Court to give effect to it. But where the testator merely uses some such phrase as the "receipt of payment" or the "time of payment" with reference to a payment directed to be made at a definite period such as majority, and there is nothing else in the settlement to indicate any intention to postpone vesting, it is only reasonable to conclude that the mention of the "receipt" or "time" of payment refers to the same period as that at which payment is directed to be made. In the present case that period was the attainment by the son of full age. I do not regard it as material that the payment was to be "subject to retention" in whole or in part for his mother's annuity; the direction was none the less a direction for payment at majority. There is therefore no reason for following a somewhat special case like *Howat's Trustees* in preference to precedents of wider application such as *Chalmers' Trustees*, (1882) 9 R. 743. On the construction of this particular settlement I do not feel any doubt whatever as to its meaning, and accordingly I propose that we should answer the first question in the affirmative and the second question in the negative.

There remains only a question with regard to the suggested merger of the widow's alimentary annuity with the right of fee in the estate which she acquired under her son's will. There is nothing in the terms of this settlement, or in the law relating to trusts for the preservation of an alimentary annuity, which would entitle the widow, having acquired—as she has—the fee of the residue, to present a demand on the trustees to denude of the residue in her favour. All that she is entitled to under her son's will is the residue of the estate as given to him by his father's settlement—that is to say, the residue of the estate subject to the trust for payment of an alimentary annuity to her, and the trustees are just as much bound—notwithstanding her acquisition of the fee—to make provision for the payment of that alimentary annuity as they were before. I propose therefore that the third question should be answered in the negative.

LORD MACKENZIE—I agree that the sound construction to be put upon the fifth purpose of this settlement is that the words "dying before receiving payment" mean "before the term of payment." The son attained majority and therefore survived the term of payment. Accordingly he was free to dispose of the residue destined to him but subject to the express provision of the fourth purpose of the settlement I am quite unable to see how the trustees could be absolved from the duty put upon them by the fourth purpose in regard to the payment to the widow of the annuity of £150 a year which is declared to be "for her alimentary use allenarly, unaffectable by her debts or deeds and unattachable by the diligence of her creditors.

LORD SKERRINGTON—The will which we have to interpret has been drafted carelessly and apparently in ignorance of the fact that the language selected had repeatedly led to trouble and litigation. It is unfortunate that conveyancers should repeat the blunders of their predecessors without learning anything from judicial decisions. I agree with your Lordships as to the construction which ought to be placed upon the words "before receiving payment of their shares of my estate" as used by the testator. Further, I think it clear that the widow's alimentary annuity must continue to be protected by the trustees.

LORD CULLEN—On the terms of this will it appears to me to be clear that the testator contemplated one term of vesting only, and did not contemplate the possibility of an indefinite series of terms of vesting such as the third parties' argument involves in treating the word "payment" as equivalent to actual payment. That being so, I think the testator must have intended the single term of vesting contemplated by him to be the arrival of the period of payment which he prescribes in the words "shall be payable to my children as they respectively attain majority."

On the second question I think that on authority there is here a well-constituted alimentary annuity in favour of the widow, and further that all she has received under the bequest by her son is the reversionary interest in the fee of the estate subject to the due fulfilment of the testator's directions as to the payment of the annuity and the protection of its alimentary character through the keeping up of the trust created for that purpose.

The Court answered the first question in the affirmative, and the second and third questions in the negative

Counsel for the First Parties—Fisher. Agents—John Macmillan & Son, S.S.C.

Counsel for the Second Parties—Irvine, K.C. — Aitcheson. Agents — John Macmillan & Son, S.S.C.

Counsel for the Third Parties—Henderson, K.C. — Taylor. Agents — Cowan & Dalmahoy, W.S.

Thursday, June 1.

FIRST DIVISION.

[Sheriff Court at Perth.

STRONG *v.* JOHN WRIGHT & COMPANY.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the Course of the Employment*"—*Workman Descending from Moving Lorry to Pick up his Jacket.*

A workman whose duty it was to accompany the driver of a motor lorry and to assist him in the work of loading and unloading, was sitting beside the driver waiting to assist at the next stoppage. When near their destination the workman took off his jacket and

placed it on the seat. It was blown off the lorry, and the driver, who was aware of what had happened, slowed down to about five miles an hour with the intention of stopping. Before the lorry had stopped, the workman attempted to get down to recover his jacket, and in doing so came in contact with the near hind wheel of the moving lorry and was seriously injured. *Held* that the accident was one "arising out of the employment."

Charles Strong, brewery worker, Perth, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Perth (BOSWELL) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and John Wright & Company, brewers, Perth, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration in which the pursuer and appellant claimed statutory compensation in respect of injuries sustained by him in the course of his employment. . . .

"I found the following *facts* proved:—1. The defenders and respondents use in connection with their business a motor lorry. On 15th August 1921, the day of the accident, it was driven by David Watson, a properly qualified and satisfactory motor driver, who had driven it for eighteen months. No act of hostility or unkindness on his part to the pursuer was proved. The lorry was a three-ton Albion with a top speed of 12 miles per hour. It could be stopped in twice its length of 20 feet 7 inches if loaded, and in about its length if empty. The distance from the top step to the second step on the left-hand side is 1 foot 4 inches, and from the second step to the ground 1 foot 7 inches. The distance from the doorway to the back wheel is 8 feet 11 inches. Anyone getting off the lower step is directly in line with the near hind wheel. 2. The pursuer was employed by the defenders as an extra hand at a fixed wage of £2, 15s. per week, and on the said day his duties were to accompany Watson on the lorry to assist him in the loading and unloading of cases of beer, etc. In performing these duties it was not necessary for the pursuer to step down from a moving lorry, and it was not his custom to get off in that way, but no rule, instruction or agreement against it was proved. 3. On the said day the lorry had been delivering beer at Ladybank and was returning to and nearing Perth with empty cases. Watson and the pursuer were both in it, and in the course of their employment, Watson driving and the pursuer sitting beside him on his left, and waiting to assist at the next stoppage—the defenders' premises. 4. That the accident took place . . . about 1½ miles from the defenders' premises. Being so near their destination Watson said to the pursuer, 'Square up Charlie,' on which the pursuer took off his jacket to be ready for work and placed it on the seat on his left. It immediately fell off the lorry, aided no doubt by the rush of air and perhaps by a gust of wind. The pursuer drew Watson's attention by touching his arm and saying, 'Oh, my jacket, Davie!' and Watson at once slowed down the lorry to about 5 miles per hour with the intention of stopping it. 5. At this point, and while the speed of the lorry was being diminished, the pursuer got up and proceeded to step out of the left entrance to the covered driver's seat for the purpose of recovering his jacket. In doing that he took hold of the handle in front of said opening with his right hand and of that on the other (hinder) side with his left, with the result that he faced outwards and directly towards the left side of the road. He then descended towards the ground by the steps, turning as he did so in such a way as to face towards the back of the lorry. At this point Watson ceased momentarily to observe the pursuer, but was bringing the lorry to rest. The moment it stopped he looked back and saw the pursuer up against its near hind wheel. Up to that moment it had continued to move although at decreasing speed. When so seen, the pursuer had one leg on each side of the wheel, his right hand holding the vertical stay of the mud guard and the left hand on or near the driving chain. He was thus facing in the same direction as when last seen by Watson—towards the back of the lorry. A mark on the road showed that he had been dragged about 3 yards. 6. That the pursuer was seriously and permanently injured. His injuries have totally incapacitated him from all work up to and including the present time. He suffered from numerous and severe fractures of the pelvis bones, his left leg is permanently shortened by 2 inches and the top joint of his left thumb had to be amputated. 7. That the speed at which the lorry was moving when the pursuer stepped down cannot be ascertained except that it was not more than 5 miles per hour and probably less, possibly less than 4.

"I inferred from the foregoing facts that the accident resulted from the pursuer descending from a moving lorry without taking the necessary precautions in the direction and timing of his step to the ground. I found in fact and in law in these terms.

"I found in law that the pursuer did not require to step from a moving lorry for any purpose connected with his employment, and that the accident did not arise out of his employment, and accordingly I did not award any compensation under the Act."

The *question of law* for the opinion of the Court was—"On the facts stated was I entitled to find that the accident did not arise out of the appellant's employment."

Argued for the appellant—The case was identical with that of *M'Lauchlan* v. *Anderson*, 1911 S.C. 529 (finding in fact, No. 8, at 530), *per* Lord Dunedin at p. 531, 48 S.L.R. 349. The lorry had slowed down to such an extent that the risk in jumping off was negligible and reasonably incidental to the employment. The following cases were also referred to:—*Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498, *per* Lord Loreburn, L.C., at p. 500; *Bourton* v. *Beauchamp*, [1920] A.C. 1001, *per* Viscount Cave at p. 1006.

Argued for the respondents—The onus was on the applicant to satisfy the arbiter that the injury arose out of his employment. The arbiter had held that he was doing a thing that did not so arise in respect he got down from a moving vehicle instead of waiting until it came to a standstill. Such a risk was not involved in the employment. The case of *M'Lauchlan* was distinguishable in respect that there the vehicle was not being brought to a stop. This was a case of "added peril." In acting as he did the claimant had put himself outside the scope of his employment, and had disentitled himself from claiming compensation—*Fraser* v. *Lochgelly Iron and Coal Company*, 1920 S.C. 667, 57 S.L.R. 589; *Lancashire and Yorkshire Railway Company* v. *Highby*, [1917] A.C. 352, *per* Lord Sumner at p. 372; *Brown* v. *Baton Colliery Company*, 1921 S.C. 323, 58 S.L.R. 268; *Symon* v. *Wemyss Coal Company*, 1912 S.C. 1239, 49 S.L.R. 921; *Byre* v. *Larrinaga & Company*, (1918) 11 B.W.C.C. 260.

LORD PRESIDENT—The workman was riding on a lorry belonging to his employers and driven by a fellow-servant. The lorry was used for making deliveries of beer to the employers' customers, and the workman acted as "loader" of the lorry. At the time of the accident the lorry was returning to the employers' premises, and had nearly arrived there. In anticipation of the work of unloading the empties on arrival the workman had taken off his coat and placed it on the lorry beside him. Thereafter the coat blew off on to the road. The driver being aware of what had happened, slowed down the lorry with the intention of bringing it to a standstill. Before it actually stopped, and while the lorry was still moving at a reduced pace of something between four and five miles an hour, the loader was proceeding to dismount by the steps when by some mischance he fell from them and came in contact with the near hind wheel of the moving lorry. He suffered serious injuries.

There was no prohibition either in law or in the terms of the loader's employment against leaving the lorry while in motion, and accordingly there is no room for applying to this case the rule which recent House of Lords' decisions have definitely established, that a workman who acts in contravention of a prohibition, whether contained in statute or statutory bye-law, or constituting one of the terms of his employment, is disabled from claiming the benefit of the Act. The ground upon which the learned arbitrator refused compensation appears from his second finding in fact and his finding in law, namely, that in performing his duties it was not necessary for the workman to step down from the lorry until it had come to a standstill—in short, that "the appellant"—I use the learned arbitrator's words—"did not require to step from a moving lorry for any purpose connected with his employment." Now there is, I think, no doubt that the recovery of the coat was in the circumstances a most reasonable incident in the performance of the man's duties to his master, and it is in my opinion a mistake to suppose that something which is not actually necessary or which is not positively required for the performance of his duties necessarily lies outside his employment. There are many things which are reasonably incidental to the performance of his duties and covered by his employment although they cannot be described as necessary or as required for such performance. On the facts held proved by the learned arbitrator I am unable to find any evidence to support the conclusion that the workman at the time the accident happened to him was doing any act other than was reasonably incidental to his employment and to the performance of his duties. It is true that what he did involved a risk which he might have avoided. And I think that if the risk had been such as it was not only unnecessary but unreasonable for him to undertake he might have put himself outside the scope of his employment by ultroneously making and undertaking an added peril. But no conclusion of that kind can be reached from the circumstance that instead of waiting until the lorry had come to a complete standstill he attempted to leave it while it was still moving at a rate of no more than four or five miles an hour. The attempt was carelessly executed, for his face and person were turned rather towards the back of the lorry than in the direction in which it was going. But that is just an ordinary piece of negligence occurring in the performance of an act itself incidental to the employment.

Accordingly it seems to me that the question which the learned arbitrator puts—whether he was entitled on the facts found by him to decide that the accident did not arise out of the appellant's employment—ought to be answered in the negative.

LORD MACKENZIE—I agree that the question ought to be answered in the negative. I do so upon this ground, that there was no evidence upon which the arbitrator was entitled to hold that the appellant in getting down from the motor lorry while it was moving at not more than five miles an hour for the purpose of recovering his coat exposed himself to a risk not reasonably incidental to his employment. I recognise that there might be a case in which the circumstances were similar to those of the present, with this difference, that the pace at which the lorry was going was considerably greater, in which an arbitrator might be able to come to the conclusion that if the workman got down he exposed himself to a risk not reasonably incidental to his employment. But it is impossible in the present case, where there is a finding to the effect that the pace was not more than five miles an hour, to say there was evidence to justify the conclusion reached by the arbitrator.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur. I think the case is not one of a workman stepping beyond the scope of his employment, but

one of a workman doing an act within the scope of the employment in a careless or negligent way.

The Court answered the question of law n the negative.

Counsel for Pursuer — Wilton, K.C. — Guild. Agents—M'Neill & Sime, S.S.C.

Counsel for Defenders — Brown, K.C. — Fenton. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday, June 9.

SECOND DIVISION.

[Lord Morison, Ordinary.

BROWN *v.* GLASGOW CORPORATION.

Reparation — Negligence — Remoteness of Damage—Nervous Shock Resulting from Terror and Causing Miscarriage—Averments—Relevancy.

Process — Proof or Jury Trial — "Special Cause"—Evidence (Scotland) Act 1866 (29 *and* 30 *Vict. cap.* 112), *sec.* 4.

In an action of damages against a tramway company the pursuer averred that when she was walking on the footpath a car was driven towards her by one of the defenders' servants down a steep declivity to a turn which he knew to be dangerous, in so reckless a manner that she became terrified lest it should leave the rails, "mount the footpath where she was, run into her and kill or injure her," that she thereby received a severe nervous shock, and that the fright thus caused to her resulted in her having a miscarriage with much consequent suffering. She further averred that while it was the duty of the defenders to employ a competent driver, the driver was young, unqualified, inexperienced, and incompetent, and that after the car had passed her it actually crashed into a trolley standard and retaining wall, causing serious injury to a number of people. The defenders pleaded that the action was irrelevant. *Held* (*diss.* Lord Salvesen) that the pursuer had stated a relevant case for inquiry.

Dulieu v. *White & Sons*, [1901] 2 K.B. 669, *followed.*

Held further (*diss.* Lord Salvesen) that no special cause had been shown why the case should not be sent to a jury, and issue *allowed.*

Mrs Annie Boyd or Brown, wife of and residing with John Brown, engineer, 24 Leyden Street, Maryhill, Glasgow, *pursuer*, brought an action for payment of £300 damages for personal injuries against the Corporation of the City of Glasgow, who owned and controlled the system of electric tramways in Glasgow and the neighbourhood, *defenders.*

The pursuer averred, *inter alia*—"(Cond. 2) On Monday 27th June 1921, between three and half-past three o'clock afternoon, the pursuer was walking in a north-easterly direction along the south-east footpath of Bilsland Drive, Maryhill, aforesaid. At the same time one of the defenders' tramway cars was proceeding along Bilsland Drive aforesaid, on the south-east set of rails, in a south-westerly direction. As the car approached the pursuer she observed that it was out of control of the driver, and that it was being driven at an excessive rate of speed down a steep declivity to what is well known as a dangerous turn, where a tramway car had left the rails and crashed against a retaining wall a year or two previously. This dangerous turn was between her and the approaching car. The car gained in speed and rocked from side to side. The pursuer saw this, and was in terror that the car would leave the rails, mount the footpath where she was, run into her and kill or injure her. She was thrown into a state of terror. In point of fact the car did leave the rails a little behind where the pursuer was standing; the passengers screamed, and the car crashed into a trolley standard and the said retaining wall a few yards from the pursuer. The impact was so great that the standard cleaved the front vestibule of the car and penetrated to the doorways of the compartment of the upper and lower decks. Fourteen persons were injured, many of them very seriously. The car ought to have stopped at an all-car stop station situated between the place where the pursuer was standing and the place where it left the rails, but owing to the speed at which the car was travelling and the fact that the driver had lost control of it he was unable to draw it up there. . . . (Cond. 3) Through the careless and reckless actings of the driver, for whom the defenders are responsible, the pursuer was thrown into a state of terror for her safety as above condescended on, and received a severe nervous shock, resulting in serious injury to her health, which may be permanent. The said shock was the natural and probable result of the driver's negligence. (Cond. 4) The pursuer's injuries were due to the fault and negligence of the defenders. At the time of the accident the car was being driven by a servant of the defenders in the course of his employment. It was the duty of the driver of the car to have the car under complete control and to drive the car slowly and carefully down the declivity, especially when approaching the turn which he knew to be dangerous. Instead of doing so he recklessly drove the car at too high a speed and so caused the accident. Had the driver driven slowly and kept his car under control he could have avoided crashing into the standard. Moreover, it was the duty of the defenders to employ a competent person to drive the car, but the pursuer believes and avers that the driver was young, unqualified, inexperienced, and incompetent. Had the driver been competent and qualified, and had he driven the car carefully, he could have controlled it and so have prevented the pursuer being thrown into a state of terror for her own safety. . . . (Cond. 5) At the time of the accident the pursuer was pregnant. The pursuer