defender has further to satisfy us that the Lord Ordinary has wrongly exercised the discretion, which in the first instance is vested in him, of granting or refusing the motion, even after proof of the pursuers' inability to pay the defender's expenses.

Mr Wilson presented a strong argument to the effect that his clients are pursuing a *bona fide* litigation on probable grounds, and the Lord Ordinary has apparently accepted that view and has refused to ordain them to find caution as a condition of their proceeding with the action. I do not think sufficient ground has been shown for our interfering with the exercise of his discretion, although I do not doubt that if we were satisfied that the discretion had been wrongly exercised we should be entitled to do so. On this matter I adopt the language of the Master of the Rolls in the *Northampton Coal Co.* v. *The Midland Waggon Co.*, (1878) 7 Ch. D. 500, where he says that the Court of Appeal is quite entitled to examine into the grounds of the exercise of the discretion. I therefore agree with your Lordship in the chair.

LORD MACKENZIE — We are asked to apply the provision of section 278 of the Act. This the Lord Ordinary has refused to do. It is necessary in order to interfere with the exercise of a discretionary power that a very clear case should be made out.

In order to apply section 278, in the first place the Court must be satisfied upon credible testimony that there is reason to believe that the limited company will be unable to pay the costs of the defender if successful in the action. In my opinion Mr Fleming was successful in showing a strong case in favour of that proposition. But then that is only the first step. It is necessary further to consider, having in view the nature of the action and the *prima facie* case made by the pursuers on record, whether or not it is a case in which the provision of the section in regard to requiring security should be enforced. If it could have been shown that *prima facie* this company had been got up, not for the purpose of *bona fide* working coal, but—having discovered that there was a possible claim which might result in profit—of prosecuting that claim and at the same time of shielding the members of the company from responsibility for expenses, then I think that would have gone far to make out a case for putting in force the provisions of the section in question.

But the argument which we have heard from the pursuers' counsel has led me to the conclusion that that is not the *prima facie* aspect of the case. It appears, so far as we can judge from what has been put before us that the company was formed for the purpose of working coal, and that it was only in the course of their operations that the matters complained of were discovered. In these circumstances I am of opinion, with your Lordships, that the reclaiming note should be refused.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court adhered.

Counsel for Pursuers (Respondents) — D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for Defender (Reclaimer)—D. P. Fleming. Agents — Drummond & Reid, W.S.

Wednesday, June 28.

FIRST DIVISION.

(SINGLE BILLS.)

THE LONDON COUNTY AND WESTMINSTER BANK, LIMITED, PETITIONERS.

Process — Vacation — Bill Chamber — Petition — Company — Statute — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 135.

The Companies (Consolidation) Act 1908, sec. 135, enacts—"The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills."

In a petition for the winding up of a limited company under the above section, *held* (1) that a special adjournment of the Court on account of His Majesty's coronation was equivalent to vacation, and (2) that the Lord Ordinary on the Bills had therefore jurisdiction to entertain the petition.

The London County and Westminster Bank, Limited, presented a petition under the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), for the winding up of D. C. Paton & Company, Limited. In consequence of His Majesty's coronation the Court of Session was adjourned from Wednesday, 21st June, to Saturday, 24th June, both days inclusive, and the petition was therefore brought before the Lord Ordinary on the Bills (SKERRINGTON), on 23rd June 1911, who pronounced an order for intimation, service, and advertisement. The petitioners being doubtful as to the jurisdiction of the Lord Ordinary on the Bills in the matter, repeated their motion on Wednesday, 28th June, at the resumed sittings of the Court.

LORD PRESIDENT—This is a petition for the winding up of a limited company, and it was presented last week to the Lord Ordinary on the Bills when the Court was not sitting. The Lord Ordinary considering that he had jurisdiction made an order for intimation and service, but *ob majorem cautelam* that order is asked again to-day. Now the jurisdiction of the Lord Ordinary on the Bills depends on sec. 135 of the Companies (Consolidation) Act 1908, which is as follows— . . . [*His Lordship here read*

the section quoted in rubric.] . . . Now it is put forward that the words "in time of vacation" are conditioned by the preceding words "in the event of a remit." I think that is an unnatural and inconvenient construction and that the words "in time of vacation" are dependent on the principal subject of the clause, viz., "the Court of Session in either Division thereof." That being so, the only question is whether last week was vacation. I think it was, and that it must be treated in the same way as the Christmas recess. Accordingly I think we ought to refuse the motion as unnecessary.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I also agree.

LORD KINNEAR was absent.

The Court refused the motion.

Counsel for Petitioners — MacRobert. Agents—Hope, Todd, & Kirk, W.S.

Thursday, June 29.

FIRST DIVISION.

[Sheriff Court at Falkirk.

M'LAREN & OTHERS *v.* CALEDONIAN RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—"*Arising out of the Employment*"—*Taking Shorter Route along Railway Line.*

A canal overseer in the employment of a railway company, in returning to his office on the canal from a railway station where he had been in the course of his duties, went along the railway line, which was shorter, instead of going by road. While walking along the line he was knocked down by a train and received injuries from which he died. In a claim by his widow and children under the Workmen's Compensation Act 1906, *held* that though the accident arose in the course of the deceased's employment, it had not arisen out of his employment, and that the employers were not liable.

Mrs Sarah Jane Johnston or M'Laren, widow of Alexander M'Laren, overseer on the Forth and Clyde Canal, who was in the employment of the Caledonian Railway Company at the time of his death, and others, *appellants*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from the Caledonian Railway Company, *respondent*, and being dissatisfied with the determination of the Sheriff-Substitute at Falkirk (MOFFAT), acting as arbitrator under the Act, appealed by way of Stated Case.

The following *facts* were admitted or proved — "(1) The deceased Alexander M'Laren was a canal overseer on the Forth and Clyde Canal in the employment of the respondents. (2) He had been an overseer in the respondents' employment for 14 years. (3) It was part of his duty to issue application forms for what are known as 'privilege' railway tickets to the employees of the respondents employed on the canal. (4) His office and workshop were situated on the south bank of the Forth and Clyde Canal at Tophill, Camelon. (5) On 2nd September 1910, in accordance with instructions received from his superiors, and in connection with his duties with regard to privilege railway tickets, he went to Grahamston Station on the North British Railway and made a payment of money there for the respondents to the clerk in charge of the booking office, who received it on behalf of the North British Railway Company and gave a receipt therefor, said payment being for excess on a railway privilege ticket collected from one of the canal employees. (6) After making said payment at Grahamston Station he proceeded to go back to his office, where it was his duty, *inter alia*, to forward said receipt to his superiors in Glasgow. (7) In returning to said office he went along the railway line of the North British Railway from Grahamston Station towards a level-crossing at a swing bridge carrying the North British Railway which crosses the portion of the Forth and Clyde Canal over which the deceased was overseer. (8) While walking at the side of the railway line he was overtaken by a passenger train belonging to the Caledonian Railway Company, and running over said line in virtue of running powers possessed by the Caledonian Railway Company. (9) He was knocked down by the engine of said train and severely injured. (10) In consequence of the injuries so received he died on 5th September 1910. (11) In order to go from Grahamston Station to his office there was no necessity for the deceased to go along the railway line. (12) He could have gone perfectly easily by the public road. (13) Going by the railway line and getting on to the south bank of the canal at said swing bridge was a little shorter. (14) He had used the railway line for a number of years. (15) He had no right to do so. (16) The deceased had not been checked by the North British Railway Company's employees, but many other people have been checked for walking along the railway line. (17) He had been warned by one of his superiors not to go along the railway line. (18) The part of the line where he was overtaken by the train is very dangerous owing to the path at the side being very narrow, and the deceased himself increased the danger by walking on the same side of the railway as the traffic in the direction in which he was going. (19) The appellants are dependants of the deceased."

In these circumstances the Sheriff-Substitute held that the accident by which the deceased met his death arose in the course of his employment, but did not arise out of his employment.

The *questions of law* for the opinion of the Court were — "(1) Did the accident