expenses of and incident to this application to be paid out of the trust estate, or to do further or otherwise in the premises as to your Lordships may seem proper."

Argued for the petitioners—The authority sought so far as regards the allowance to Muriel, who had attained majority, involved the exercise by the Court of its *nobile officium*, but it was plainly in accord with the testator's intentions. *Robertson's Trustees, Petitioners*, 1909 S.C. 236, 46 S.L.R. 139, was referred to.

The Court without delivering opinions pronounced this interlocutor—

". . . Authorise the petitioners to advance to the daughters of the late James Strachan Milne, Agnes and Muriel Milne, out of the surplus income or out of the capital of the trust estate under the petitioners' charge, so long as the said daughters shall be unable to suitably maintain themselves or until further orders by the Court, yearly allowances of £400 and £250 respectively for their maintenance and support, and decern. . . ."

Counsel for the Petitioners—Chree, K.C. —C. Mackintosh. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, November 27.

FIRST DIVISION.

[Sheriff Court at Ayr.

WILLIAM BAIRD & COMPANY, LIMITED *v.* M'GRAW.

Master and Servant—Workmen's Compensation—"Arising out of"—"In the Course of"—Workman Returning for Pay and Sitting between Rails—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1).

A boy employed at the picking tables at a coal pit went to the pit on the pay day, not to work but to draw pay which was due to him. If he had been working on that day he would have got his pay line from the man in charge of the boys working at the picking tables. By the routine at the pit, when a boy was not working on the pay day his pay line was handed to the pit-head gaffer. The boy knew he would require to get his pay line from the gaffer. He arrived at the pit a little before the time when in his experience the gaffer brought round the pay lines, and sat down on a block of wood which was situated between a pair of rails on which and behind the boy there was a waggon spragged to prevent it moving towards a fire which was also between the rails and in front of the boy. The day was cold and wet and the boy took up that position to warm himself while waiting for the gaffer. He thereafter got up and searched for the gaffer unsuccessfully. He then returned to the fire, when another boy told him he expected the gaffer to be round with his pay line immediately, and the boy in question then resumed his seat on the block. The block was reached by descending a stair from the picking tables, and it was the regular custom for the pickers and other workers at the pit-head to come round the fire in cold weather and eat their pieces. While the boy was sitting on the block, owing to the carelessness of some other workman a waggon was allowed to run into the spragged waggon. It knocked out the sprag and caused the waggon to run over the boy's leg, which had to be amputated. In an arbitration for compensation the arbitrator held that the accident arose out of and in the course of the employment. *Held* that upon the facts stated the arbitrator could competently so find.

William Baird & Company, Limited, coalmasters, Auchincruive Collieries, Prestwick, *appellants*, being dissatisfied with an award of the Sheriff-Substitute at Ayr (BROUN) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought against them by Thomas M'Graw junior, *respondent*, appealed by Stated Case.

The Stated Case set forth—"The following *facts* were admitted or proved:—1. In March 1919 the respondent, a boy of sixteen years of age, was employed by the appellants as a coal picker at the coal picking tables at their Mossblown Pit. 2. The coal picking tables are on the pit-head, which is reached by a stair from the ground level. The tables work on the endless chain principle. The coals from the pit are dropped through shakers on to the upper end of the table. As the coals are carried along the table, the coal pickers standing on each side of the table, pick out the stones and grit. The coals then drop into a shute at the lower end of the table, and slide into a railway waggon standing on the rails on the ground level at the west side of the pit-head. This waggon, which is looked after by a lad called a 'trigger,' is spragged, while being loaded, by means of a 'scutch,' which is a triangular piece of wood placed on the rails in front of the wheels of the waggon. When the waggon is filled the trigger withdraws the scutch and removes the waggon westward along the rails into the lies or sidings beside the Glasgow and South-Western Railway which runs past the mine. He then brings up an empty waggon into position and sprags it in similar fashion. 3. Parallel to the line of rails on which the coal waggon is standing while being filled is another line of rails called the Diamond Road. This line runs from the lies past the south side of the pit-head and terminates at the saw mill to the east of the pit-head. On the Diamond Road on wet and showery days, down to the date of the accident after mentioned, a fire was kept burning between the rails close to where the trigger was working. The purpose of this fire was to dry the scutches used for spragging the waggons. 4. It was the regular custom for the triggers, coal pickers, and other workers at the pit-head to come round the fire in

cold weather and eat their 'pieces' during the short time off for refreshment. To get to the fire the coal pickers had to come down the stair from the pit-head. 5. On Friday, 7th March 1919, which was a wet and sleety day, the respondent slept in until it was too late to go to his work. But Friday being the pay day at the mine he determined to go to the colliery and get his pay. 6. Pay is made to the surface workers at the colliery in the following manner:—Pay lines are made out at the office and given in the office about 1 p.m. to the pit-head gaffer, J. Shannon. The night shift workers assemble at the office door from 1 to 1·15 p.m. and to them Shannon hands their pay lines. He then goes round the pit-head and distributes the pay lines to the employees at work. He gives the pay lines for the coal pickers to Robert Trousdale, the man who looks after the boys. If any coal picker is not at work, Trousdale hands back that boy's pay line to Shannon. The pay lines are cashed at the office by the employees after they get them. All that the respondent knew about the practice of paying was that Shannon went round the pit-head about 1·30 p.m. distributing the pay lines, that he (the respondent) would not get his pay line from Trousdale if he was not at work on the pay day, and that if he did not get his pay line from Shannon he would not get his pay that day at the office. On one pay day before 7th March 1919 the respondent had not been working, and on that day he went for his pay to the colliery, sought out Shannon at the pit-head about 1·30 p.m., received his pay line from him, and thereafter went to the office and got his pay. The trigger, a lad called Alexander Hamilton, had done the same thing on a pay day when he had not been working at the colliery. 7. On 7th March 1919 the respondent entered the colliery by way of the lies and arrived at the fire burning between the rails on the Diamond Road. On these rails, east of and about three yards from the fire, an empty waggon was stationed. This waggon was spragged with a scutch to prevent it moving towards the fire. There was a block of wood between the waggon and the fire forming a seat, and on this the respondent sat down with his face to the fire to warm himself as he was wet and cold and it was not yet 1·30 p.m. 8. After sitting a quarter of an hour or more at the fire, it being then about 1·30 p.m., the respondent went to look for Shannon. He went up the stair to the pit-head and entered the weighman's box there and asked Riddox, the weighman, if Shannon was there. Riddox answered that he was not, but that he might be at the saw mill. The respondent then descended the stair and went to the saw mill, but did not find Shannon there. 9. The respondent then went back to the fire on the Diamond Road and asked Hamilton, the trigger, if he had seen Shannon. Hamilton answered 'No.' The respondent then asked Hamilton if he had got his pay line. Hamilton replied that he had not. The respondent then told Hamilton that he had slept in and had come to the colliery for his pay, and that he was looking for Shannon in order to get his pay line. Hamilton said that he expected Shannon to be round immediately with his (Hamilton's) pay line. The respondent thereupon sat down on the block by the fire to await the coming of Shannon. 10. While the respondent was sitting waiting, a waggon at the saw mill, through some carelessness on the part of the workers there, ran away along the Diamond Road and struck the waggon standing near the fire, knocking this waggon off the scutch up against the block on which the respondent was sitting. The respondent was knocked off the block and projected across the fire to the other side, and the waggon ran over the fire and then over the respondent, one of the wheels passing over his right leg. 11. The respondent's right leg had in consequence to be amputated. 12. By reason of the said injury caused by said accident the respondent has been since 7th March 1919 and still is totally incapacitated for work. 13. At the date of the said accident the respondent's average weekly earnings amounted to 12s. 4d.

"On 8th July 1919 I *found in fact and law* as the result of the said findings in fact that the personal injury received by the respondent on 7th March 1919 was caused by accident arising out of and in the course of his employment by the appellants. I therefore found that the respondent was entitled to compensation from the appellants for total incapacity caused by the said injury from 7th March 1919 till the further orders of the Court, and assessed the said compensation at 10s. per week. I also found the appellants liable to the respondent in expenses."

The *question of law* was—"On the foregoing facts was I entitled to hold that the personal injury received by the respondent on 7th March 1919 was caused by accident arising out of and in the course of his employment by the appellants?"

The arbitrator's *note* appended to the award was as follows:—"I am of opinion that the pursuer was injured by accident arising out of and in the course of his employment. In order to get his pay he had to go to the colliery, and before getting his pay at the office he had to receive his pay line from Shannon. By looking for Shannon about the pit-head at 1·30 p.m. he was acting in the only way he was aware of, and in the way he and others were accustomed to act. When he was told by Hamilton that Shannon would be round immediately, it was quite reasonable for pursuer to await his coming, and he was entitled to assume that the seat by the fire was a perfectly safe place for him at which to wait."

The following authorities were referred to:—*Phillips* v. *Williams*, 1911, 4 B.W.C.C. 143, *per* Buckley, L.J., and Fletcher Moulton, L.J.; *Riley* v. *Holland & Sons, Limited*, [1911] 1 K.B. 1029; *Lowry* v. *Sheffield Coal Company, Limited*, 1907, 24 T.L.R. 142, 1 B.W.C.C. 1; *Morris* v. *Rowbotham*, 1915, 8 B.W.C.C. 157; *Reid* v. *Great Western Railway Company*, [1909] A.C. 31, 46 S.L.R. 700; *Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804; *Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861; *Tinker*

v. *Hulse & Company, Limited*, 1918, 11 B.W.C.C. 28; *Philbin* v. *Hayes*, 1918, 11 B.W.C.C. 85, *per* Swinfen Eady, L.J., at p. 91; *Stevens* v. *London and South-Western Railway Company*, 1918, 11 B.W.C.C. 7; *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352, 55 S.L.R. 509; *Officer* v. *Davidson & Company*, 1918 S.C. (H.L.) 66, 55 S.L.R. 185.

At advising—

LORD PRESIDENT—On the facts set out on this Stated Case the statutory arbitrator found that the personal injury received by the respondent was caused by accident arising out of and in the course of his employment. We have to consider whether the facts warrant this conclusion. I think they do. The day of the accident—Friday the 7th of March 1919—was pay-day at the mine where the respondent was employed as a picker. The respondent went to the mine that day to obtain his pay at the hour when, according to the ordinary routine, the pay-lines were given out to the workmen. Without a pay-line he could not obtain payment of his wages at the pay-office. His sole purpose in going to the mine was to obtain payment of his wages. He did not go to engage in work that day; he had slept until it was too late to go to his work, but his contract of employment still continued, and it was his duty to go for his pay to the mine. The appellants, of course, did not undertake to send the workmen's pay to their homes. Had the respondent been at work on the day in question he would have received his pay-line from a man named Trousdale, who looks after the boys engaged as pickers. But as the respondent was not at work that day he knew that in order to receive his pay at the office he must procure his pay-line from the pit-head gaffer, Shannon. When the respondent went to the mine about the hour when he knew the pay-lines were in ordinary course distributed, he was unable after a search to find Shannon, but a lad named Hamilton informed him that he expected Shannon to be round immediately with his (Hamilton's) pay-line. The respondent then sat down on a block of wood by a fire to await Shannon's coming. While thus sitting the accident befell him which gave rise to the present claim. It was contended on behalf of the appellants that the accident did not arise in the course of the respondent's employment but at a time when he was engaged in the prosecution of his own interests, and that he was engaged in his own and not in his master's business when mischief befell him. And in a sense this is true. If employment ceases when industrial work ceases, then unquestionably the respondent has no case. But employment does not so cease; it continues during many acts done in the course of a workman's employment as incidental thereto. Interruption of employment does not occur every time the workman stops industrial work. When he goes to the pay-office to obtain his remuneration for work done he is acting in the course of his employment, for it is a duty incidental to his employment that he is then performing. It is the same when he is returning. This was the view taken in the Court of Appeal in England in the cases of *Lowrie*, 1907, 24 T.L.R. 142, 1 B.W.C.C. 1, and *Riley*, [1911], 1 K.B. 1029. I agree with these decisions, and with the reasoning on which the Court of Appeal there proceeded. If sound they are conclusive on this part of the case. But it was further argued by the appellants that the accident did not occur in the course of the respondent's employment because he sat down in an unsafe place to await the coming of Shannon with the pay-line. This is a question of fact on which the arbitrator is final. He has not found that the place where the respondent was seated was known to be dangerous. Quite the contrary. The respondent sat down on a block of wood by a fire which was kept burning on wet days in order to dry the scutches used for spragging the waggons. It is true that this fire was between a pair of rails. But it was apparently not considered that this was dangerous else it would not have been there. And, indeed, it appears that "it was the regular custom for the triggers, coal-pickers, and other workers at the pit-head to come round the fire in cold weather and eat their 'pieces' during the short time off for refreshment." It further appears that the accident by which the respondent was injured was due to carelessness on the part of other workers at the sawmill and not to the conduct of ordinary operations. Under these circumstances the arbitrator evidently considered that the respondent was entitled to assume that the place where he was seated was safe. I think the arbitrator was entitled so to find. And even if we disagreed with him, which I do not, we have no right to disturb his finding. The conclusion I reach is that, taking the facts as we have them adjusted by the parties, the arbitrator was entitled to find that this accident arose out of and in the course of the respondent's employment. I propose, therefore, that we answer the question put to us in the affirmative.

LORD MACKENZIE — In my opinion the arbitrator was entitled to hold that the accident arose out of, and in the course of, the employment. I do so because "in the course of the employment" is not confined to "in the course of doing industrial work." A workman is in the course of his employment *eundo morando redeundo*. If payment of wages is by settled practice made at a particular place and at a particular time, then the workman who goes to the works in order to get his wages is as much in the course of his employment as if he had been going to his work.

The facts are not found with precision in this case, but I construe them as meaning that Friday was the regular pay-day, that the pithead was the recognised place where the workmen got their pay, and that if M'Graw, in the circumstances of the case, had not gone to get his pay-line from the pithead gaffer, Shannon, he would not have

got his pay that day at the office. It was thus an implied term of the contract that M'Graw should go to the pithead on Friday to get his pay. In point of fact M'Graw was not working on the Friday, but there was no termination of the contractual relation between the workman, who was employed as a coal picker, and his employers. The accident in my opinion arose in the course of the employment.

It was argued that it did not arise out of the employment because M'Graw had added a peril by going to look for Shannon. But on a previous occasion when M'Graw was not working he had sought out Shannon, got his pay-line from him, and then got his pay from the office. Another workman, Hamilton, had done the same thing. It was further maintained that the accident was due to an added peril in consequence of M'Graw sitting down on the block by the fire. The fourth paragraph finds, however, "it was the regular custom for the triggers, coal pickers, and other workers at the pithead to come round the fire in cold weather and eat their 'pieces' during the short time off for refreshment. To get to the fire the coal pickers had to come down the stair from the pithead." It is further found that there was a block of wood forming a seat between the waggon which was spragged and the fire which was burning between the rails. It must be taken that the management acquiesced in the practice set out in the fourth paragraph, and the appellants cannot successfully found on the doctrine of added peril.

LORD SKERRINGTON—I agree with your Lordships.

LORD CULLEN—I concur in the conclusion reached by your Lordships.

On the facts as stated by the arbitrator I am of opinion that the respondent, at the time an employee of the appellants, was in the course of his employment when he was on the appellants' premises on the pay-day in question seeking to obtain payment of his earnings in a manner which is not said to have been irregular but which, on the contrary, he is said to have pursued previously with the appellants' acquiescence. He was not then doing industrial work, but he was, I think, doing what his employment included as a proper incident thereof.

I am unable to hold that the facts as stated make good the appellants' case of "added peril." It is true that the injury to the respondent arose from his being where he was while he, legitimately, waited for Shannon to come round with the pay-slips, and also that he might have waited in some other place where he would have escaped such injury. The accident, however, which occasioned the injury arose from the unexpected carelessness of certain workmen at a distance, and was one which, on the facts stated, it is not contended the respondent was bound to foresee as in any way likely to happen. In the absence of such unrequired foresight, his place of waiting was one which he was, I think, justified in regarding as licensed by the appellants. The fire for drying the scutches was, according to the ordinary course of working, placed between the rails of the Diamond Siding. We are told, further, that it was "the regular custom" for the boys working in the vicinity to gather round it during legitimate intervals of cessation from their work, and as there is nothing more in the findings on this particular head, I take it that this "regular custom" was not regarded as irregular by the appellants, but was one which had their acquiescence and sanction. The waggon in front of which the respondent sat had been duly scutched and rendered in itself inert and not dangerous. Thus there was nothing out of the usual in the conditions of the place to suggest to the respondent any reason why he should not, consistently with the appellants' treatment of it, select it as a convenient place to wait, just as other boys were allowed to resort to it when temporarily idle, in accordance with regular custom as aforesaid.

The Court answered the question of law in the affirmative.

Counsel for the Appellants — Sandeman, K.C.—Fenton. Agents — Simpson & Marwick, W.S.

Counsel for the Respondent—Watt, K.C. —Patrick. Agents—Macpherson & Mackay, S.S.C.

Friday, November 28.

FIRST DIVISION.

NORTH OF SCOTLAND AND ORKNEY AND SHETLAND STEAM NAVIGATION COMPANY, LIMITED, PETITIONERS.

Company—Procedure—Alteration of Constitution—Notice to Shareholders.

A company whose constitutive writ was a contract of copartnery proposed to alter its constitution by substituting for that contract a memorandum and articles of association, which made considerable alterations on the objects of the company. The notice to the shareholders of the meeting at which the proposal to substitute the memorandum and articles of association for the contract did not describe the proposed resolution as a special resolution. Copies of the proposed memorandum and articles of association were not sent to the shareholders, for the reason that they had already been furnished with copies, and the notice of the meeting did not refer to the copies previously sent. The notice also bore that "if passed" the resolution would be submitted to another general meeting of the company at a certain place on a certain date for final determination and approval. The Court *held* that the statutory procedure had not been followed, in respect (1) of the omission to send to the shareholders copies of the memorandum and articles of association or to refer to those formerly sent; and (2) (*v. Alexander* v. *Simpson*,