were absolutely separable, so that no part was to be read into the second, it cannot be justified upon a closer reading of the schedule. That schedule, I hold, provides that in the case of a death, the claim of dependants, both in the case of a complete three years service and in the case of a service more limited in time, extends to £150 in any case where either the total wages of the three years service in the one category, or the multiplication of the average wages by 156 in the other category, bring out a sum of less than £150. That is the case here, and I am of opinion that the Sheriff-Substitute has rightly decided that £150 is the sum to which the respondent is entitled.

LORD TRAYNER—The question raised by this appeal was incidentally argued and considered in the case of *Doyle*. In my opinion in that case I adopted a view of the meaning and effect of the first part of the First Schedule appended to the Workmen's Compensation Act different from that taken and given effect to by the Sheriff in the present case. I think the part of the schedule to which I have referred admits reasonably of two readings, and in *Doyle's* case I adopted the one which I thought the sounder reading of the two. After hearing the argument in this case, and considering what was said in the House of Lords in the case of *Stuart*, I have come to the conclusion (contrary to the opinion I formerly expressed) that the judgment now under appeal is well founded and ought to be affirmed.

LORD MONCREIFF—I think the Sheriff's judgment is right. The province of the latter part of section 1 (*a*) (i) of the First Schedule appended to the Workmen's Compensation Act is merely to provide a means of fixing the amount of the deceased workman's earnings during the three years next preceding the injury where he was not in the actual employment of the employer during the whole of the said three years. This is to be done by first ascertaining his average weekly earnings during the period of his actual employment, and multiplying that average by 156, being the number of weeks in a period of three years.

This being the sole purpose of the provision, article 1 (*a*) (i) amounts to this — Where death results from the injury, and the workman leaves dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or where his employment has been less than the said three years a sum equal to 156 times his average weekly earnings during the period of his actual employment. But in neither case shall the compensation exceed £300 or be less than £150.

If the latter part of article 1 (*a*) (i) were to be read as entirely independent of the maximum and minimum fixed in the former part, the result might be that the representatives of a workman who had only been one week in the employment might receive a larger sum than the representatives of a workman who had been in the employment during the whole period of three years. This was clearly not intended.

The Court answered the first question in the affirmative and the second in the negative.

Counsel for the Appellants — W. Campbell, K.C.—Chree. Agents—W. & J. Burness, W.S.

Counsel for the Claimant and Respondent — Salvesen, K.C. — W. Thomson. Agents—Campbell & Smith, S.S.C.

Tuesday, March 12.

SECOND DIVISION.

[Sheriff-Substitute at Dunfermline.

GIBSON *v.* WILSON.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident arising out of and in the course of Employment — Workman Climbing Railing to get to Work.*

A workman who was employed in repairing a church, on coming one morning to his work at the usual hour was unable to unlock the gate of the churchyard which surrounded the church. He therefore, in order to get access to his work, climbed up on the railing of the schoolyard which adjoined the churchyard, and thence over the churchyard wall into the churchyard. While climbing up on the railing one of the spikes pierced his foot. This injury caused tetanus, from which he died.

Held (*dub.* Lord Moncreiff) that the accident did not arise "out of and in the course of his employment" within the meaning of section 1, sub-section (1), of the Workmen's Compensation Act 1897.

This was an appeal upon a case stated by the Sheriff - Substitute at Dunfermline (GILLESPIE) in the matter of an arbitration upon a claim under the Workmen's Compensation Act 1897, made by Jane Sheriff or Gibson, widow of Alexander Gibson, painter, Musselburgh, as an individual, and also as tutor and administrator-in-law for her son William Gibson, claimant and appellant, against John Nelson Wilson, painter, Inverkeithing, respondent.

The facts found proved by the Sheriff-Substitute were as follows—"In the summer and autumn of 1900 improvements had been in the course of execution on Inverkeithing Parish Church. These consisted, *inter alia*, of removing the gallery and stone staircases, and a brick or stone wall extending across the church behind the gallery to the height of the gallery, inserting ornamental rafters into the ceil-

ing, and painter work—the painter work being purely decorative. The respondent was the contractor for the painter work. The church exceeded 30 feet in height. At the time of the accident a scaffolding about 20 feet in height was used by the respondent's workmen, including the appellant's husband, for the purpose of papering the ceiling. The only other purpose for which the scaffolding was used was for the joiners putting up the ornamental rafters before mentioned, which formed no part of the structure. No machinery driven by steam, water, or other mechanical power, was being used. The deceased Alexander Gibson, the husband of the appellant, entered the employment of David Wilson, painter, Dunfermline, the father of the respondent, on Thursday, 2nd August 1900. He worked for David Wilson in Dunfermline on that and the following day, Friday, and also for three hours on the morning of Monday, 6th August, when the respondent, who to a large extent superintended his father's business as well as his own (his father being an invalid), got a loan of Gibson's services to work at his job at Inverkeithing Parish Church. The respondent went with Gibson to Inverkeithing Church and instructed him what to do, viz., to paper the ceiling, which he worked at for the rest of that day. On Tuesday morning Gibson arrived at the door of the church at six o'clock, which was his hour for beginning work. Having got the key from a fellow-workman he put it into the lock and turned the key, but it went round and round without moving the lock. The key was one of those keys which if pushed in the right length will turn the lock, but which if pushed in as far as they will go, as Gibson pushed it, will not act. After this ineffectual attempt to get into the church Gibson proceeded northwards along the pavement of Church Street, a distance of about 80 feet from the church door, to the iron railing which fences the yard of the infant school from the street. The schoolyard is separated from the churchyard by a wall about 7½ feet high running east and west and joining the railings at right angles. Gibson climbed up on the school railing, from thence sprang on to the wall, climbed down into the churchyard, and got into the church by a window. While he was climbing up on the school railing one of the spikes pierced his foot. He could have obtained access to the churchyard by another gate, of which a key was kept by the burgh officer, who lived within less than a minute's walk of the church door, and Gibson was aware of this. There was no reason, however, for thinking that in climbing up the school railing he was actuated by any other motive than a wish to get to his work as quickly as possible. After getting into the church he sent for a handkerchief and had his foot tied up. During the rest of the week he continued to work in the church until the usual finishing time on Saturday the 11th August. On Saturday the foot had become much swollen, and he went home to Musselburgh. Thereafter tetanus set in, of which he died, the tetanus being the result of the injury to his foot. The respondent had no control over the premises in which the accident happened, and indeed had nothing whatever to do with them."

On 13th November 1900 the Sheriff-Substitute pronounced an interlocutor whereby he found in law that the claim failed on two grounds, viz., (1) that the accident to the deceased did not arise out of and in the course of his employment, and (2) that the employment was not one to which the Workmen's Compensation Act applies, and accordingly assoilzied the defender.

The questions of law for the determination of the Court of Session were as follows—"(1) Whether the accident by which the deceased Alexander Gibson was fatally injured arose 'out of and in the course of his employment' in the sense of section 1 (1) of the Workmen's Compensation Act 1897? (2) Whether the said employment was one to which the Workmen's Compensation Act 1897 applies? (3) Whether the respondent was the employer of the deceased Alexander Gibson within the meaning of said Act at the time of the accident?"

Argued for the claimant and appellant—*On question* 1—The accident arose "out of and in the course of the employment." When the deceased arrived at the churchyard gate his employment had commenced, and his working hours had begun to run. If, in finding that the key would not unlock the gate, he had stood still and waited, he would have been in the employment of his master. It was the duty of the master to provide access to the work, and in attempting to get as soon as possible to his work the deceased was acting in his master's interests. As in the present case the hours of employment had begun to run, the case was in a more favourable position for the claimant than in *Holness* v. *Mackay & Davies*, 1899, 2 Q.B. 319, where the workman had been injured on the way to his work. The mere fact that the place where the accident happened was not under the master's control did not exclude the application of the statute—*Powell* v. *Brown*, 1899, 1 Q.B. 157. And the fact that the act that caused the accident was outside the ordinary course of the employment did not exclude the application of the statute if that act was done in an emergency—*Rees* v. *Thomas*, 1899, 1 Q.B. 1015. Nor did the circumstance that the workman had chosen a method attended with danger put him outside the scope of the statute—*Durham* v. *Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279; *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732. *On question* 2—The employment was that of repairing a building more than 30 feet in height, by means of a scaffolding, and was therefore one to which the Act applied—*Hoddinott* v. *Newton, Chambers, & Company, Limited*, 1901, A.C. 49. *On question* 3—The respondent had contracted to perform a substantial part of the repair, and was therefore an undertaker—*Mason* v. *A. R. Dean, Limited*, 1900, 1 Q.B. 770. The deceased having been engaged working under and on behalf of the respondent on

the day of the accident, and for four days thereafter, the respondent was his employer in terms of the Act.

Counsel for the respondent was not called on.

LORD JUSTICE-CLERK—We have here a very clear statement from Mr Mercer, but the case seems to me to present no difficulty. On the first question I have no doubt that the Sheriff is right, and it is consequently unnecessary to consider anything else. I am quite unable, on the facts stated, to hold that the deceased in climbing on to this railing in order to get access to the churchyard, and thence to the church, was then in the course of his employment in the sense of the Act. His employment had not commenced. He had not reached the "building," and was taking his own way of coming to it; the accident could not therefore arise out of and in the course of his employment.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I have more difficulty than your Lordships on the first question in the case, and I should have preferred to rest my decision on one of the others. At the same time I am not prepared to differ.

The Court answered the first question of law in the negative, found it unnecessary to answer the other questions of law, therefore affirmed the dismissal of the claim by the arbitrator, and decerned.

Counsel for the Claimant and Appellant —Salvesen, K.C.—Mercer. Agent—Alex. Mitchell, Solicitor.

Counsel for the Respondent—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Tuesday, March 12.

FIRST DIVISION.

CALEDONIAN RAILWAY COMPANY *v.* CORPORATION OF EDINBURGH.

Police — Paving Private Street — Lands "Fronting or Abutting on" Street — Ground belonging to Railway — Frontager without Right of Access to Street—Edinburgh Corporation Act 1897 (60 *and* 61 *Vict. cap. xxxii.*) *sec.* 73.

Section 73 of the Edinburgh Corporation Act 1897 enacts, *inter alia*, "When in any private street . . . permanent buildings have been erected on one-fourth or more of the ground fronting or abutting on the same, . . . and when such street is not . . . made up, constructed, causewayed, paved, and in a complete and efficient state of repair, . . . the Corporation may if they think fit, by notice call upon the owners of the lands and heritages fronting or abutting on such street . . . to complete the same."

Held that liability under this section was incurred by a railway company whose ground in fact fronted or abutted on a private street to which the conditions of the section applied, although they had no right to the *solum* of the street, and no right of access to it.

The Corporation of Edinburgh served upon the Caledonian Railway Company a notice in the following terms:—"Notice is hereby given to the owners of the lands and heritages fronting or abutting on the private street of Wardlaw Terrace, from Stewart Terrace northwards to Wardlaw Place, that the Magistrates and Council of the City of Edinburgh call upon them to free the carriageway of the said street from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same, in terms of the specification hereto annexed, all to the reasonable satisfaction of the Magistrates and Council, within two months from and after the date of this notice, and in case this notice is not complied with within the time specified, the Magistrates and Council shall themselves, on the expiry of said period, cause the said private street or part thereof, to be freed from obstruction, and to be properly levelled, made-up, constructed, causewayed, paved, and channelled, and completed in such way and manner, and with such materials as the Magistrates and Council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be charged as a debt against the owner or owners in default; all in terms of the Edinburgh Municipal and Police Acts 1879 to 1900."

Against this notice the Caledonian Railway Company presented an appeal under section 62 of the Edinburgh Municipal and Police Amendment Act 1891.

The appellants averred as follows:—"The appellants are owners of a line of railway (known as the Haymarket Branch), which connects their main line between Glasgow and Edinburgh with their line between Princes Street Station and Granton. . . . About 700 yards from the point where it leaves the Edinburgh and Glasgow main line the Haymarket branch runs alongside a private street in the city of Edinburgh known as Wardlaw Terrace." They maintained that they were not the owners of lands and heritages fronting or abutting on Wardlaw Terrace in the sense of section 73 of the Edinburgh Corporation Act 1897 (quoted *infra*). They further averred as follows:—"The land occupied by their said Haymarket Branch (in so far as *ex adverso* of said street) was acquired by the appellants for the purpose of constructing their line from William Murray, Esq., of Henderland, in 1853, but no right or interest of any kind in or over the land which is now the *solum* of said street was granted to the appellants, and the said street was formed without the appellants being informed thereof. Since the date of the disposition the land conveyed has been separated from the ground now forming said street by a wall built and maintained by the appellants,