because (*a*) in regard to money due under the Workmen's Compensation Act 1897 it would be necessary for the pursuers to go to the Sheriff, who as arbiter must allocate any sum due under that Act among the pursuers, while the Court could immediately fix the division of the sum due under the Employers' Liability Act, and (*b*) compensation under the Workmen's Compensation Act 1897 might, at the direction of the Sheriff, be invested for behoof of the parties entitled—First Schedule (6)—while any sum due under the Employers' Liability Act 1880 must be paid over to the party to whom it was due. (3) Different parties were entitled to the sums due under the two Acts. Under the Workmen's Compensation Act 1897, compensation was due only to dependents, while under the Employers' Liability Act 1880 representatives, whether dependants or not, had a claim. In this case the eldest son, who was seventeen years old, was not likely to be a dependant.

LORD JUSTICE-CLERK—After giving consideration to this case, I am satisfied that we must hold that before the initiation of this action a sum of £282, 17s. 6d. was tendered to the pursuers—a tender which was repeated on record—and that being the whole sum which the pursuers could recover under the branch of the action in which they were successful, I am of opinion that they are liable in expenses. It is true that the answer on record containing the offer refers to the Workmen's Compensation Act, but, the fact being that the defenders tendered a sum equal to the amount which the pursuers have recovered, and that the tender was not accepted, I think that under the ordinary rules the pursuers must be found liable in expenses.

LORD ARDWALL—In the special circumstances of this case I do not dissent from the judgment which your Lordship has proposed. The circumstances are that the persons entitled to compensation for the death of the late Alexander H. Black, under the Workmen's Compensation Act, are the same persons as the pursuers in the present action. If that had not been so, I should have doubted if the tender was a valid tender which would carry expenses.

LORD LOW concurred.

LORD DUNDAS was absent.

The Court found the defenders entitled to expenses in both Courts.

Counsel for the Pursuers (Respondents)—Watt, K.C.—Mair. Agent—D. R. Tullo, S.S.C.

Counsel for the Defenders (Appellants)—Dean of Faculty (Dickson, K.C.)—Hunter, K.C.—Horne. Agents—W. & J. Burness, W.S.

Friday, November 27.

SECOND DIVISION.

[Sheriff Court at Glasgow.

PERCY *v.* DONALDSON BROTHERS.

Reparation—Master and Servant—Employment—Duration—Common Employment—Relevancy.

A workman was employed as a casual labourer, paid by the hour, upon a ship in dock, his work ending at 6 p.m. Shortly after that hour, while proceeding along the quay to receive his wages at his employers' pay-box, which was situated about fifty yards from the ship, and off the employers' premises, he was injured by the fall of a stanchion owing to the alleged negligence of the employers' servants on board the ship. The employers pleaded common employment to an action for damages.

Held that the relation of master and servant terminated when the workman finished his work and left the employers' premises, that it was not prolonged until the wages were paid, and proof *allowed*.

David Percy, labourer, Kinning Park, Glasgow, raised an action in the Sheriff Court at Glasgow against Donaldson Brothers, steamship owners, 58 Bothwell Street, Glasgow, for £250 damages for personal injuries caused by the alleged negligence of the defenders' servants.

The pursuer averred—"(Cond. 2) On or about 13th August 1907 the s.s. 'Almora,' of which the defenders are the owners and managers, was berthed at Princes Dock, Glasgow Harbour, and the defenders' servants, for whom defenders are responsible, were engaged removing the wooden superstructure from the upper decks of said ship. Pursuer had occasion on said date, about 6·10 p.m., to proceed along the breast of the quay adjacent to the said s.s. 'Almora,' and while proceeding in an easterly direction a heavy stanchion was negligently allowed by defenders' servants to fall from the deck of said ship, striking the pursuer upon the right foot, and severely injuring the great toe of said foot. Denied that pursuer at the time of said accident was in the defenders' employment. . . . Admitted that pursuer was employed on said date by defenders as a casual labourer engaged and paid by the hour, that at the time of said accident he was proceeding to the pay-box on the quay, about fifty yards from said ship, for his wages. Explained that at the time of the occurrence of the accident to him he had ceased doing any work for defenders, and that the relationship of master and servant did not then exist between pursuer and defenders, and had ceased to do so at 6 p.m. on that date."

The defenders pleaded, *inter alia*—"2. Common employment."

On 15th February 1908 the Sheriff-Substitute (BALFOUR) sustained the second plea-in-law for the defenders, and assoilzied them.

The pursuer appealed, and argued—There was no common employment at the time of the accident. The doctrine required that servants should be at work at the same place and time—*Charles* v. *Taylor*, (1878) L.R., 3 C.P.D. 492. The pursuer was no longer upon the employers' premises as in *Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; nor was the employer concerned with the pursuer's journey home—*Brydon* v. *Stewart*, March 13, 1855, 2 Macq. 30. Common employment did not exist before the day's work began—*Conlon* v. *Corporation of Glasgow*, May 27, 1899, 1 F. 869, 36 S.L.R. 652—nor, therefore, after it had ended. At the time of the accident the pursuer had no remaining duty to his employers; the sole relation between them was that of creditor and debtor. The relationship of master and servant ended as soon as the pursuer finished his work and left the ship—*Caton* v. *Summerlee and Mossend Iron and Steel Company, Limited*, July, 11, 1902, 4 F. 989, 39 S.L.R. 762.

Argued for respondents—A workman was in his employment *eundo, morando, redeundo*—*Brydon* v. *Stewart* (*cit. supra*), *per* Cranworth, L.C., at p. 36; *Todd* v. *Caledonian Railway Company* (*cit. supra*); *Sharp* v. *Johnston & Company, Limited* [1905], 2 K.B. 139. The pursuer had not gone outside the employment by taking an improper route as in *Haley* v. *United Collieries, Limited*, 1907 S.C. 214, 44 S.L.R. 193. Employment covered any ancillary purpose of the employment—*Blovelt* v. *Sawyer*, [1904] 1 K.B. 271, *per* Collins, M.R., at p. 273. The receipt of wages was an incident within the employment—*Cowler* v. *Moresby Coal Company, Limited* [1885], 1 T.L.R. 575—and it was immaterial that in this instance the pay-box was not in the respondents' premises. The risk which the pursuer continued to incur while still beside his fellow-workers was a necessary and reasonable incident of the situation he had voluntarily accepted—*Burr* v. *Theatre Royal, Drury Lane, Limited*, [1907], 1 K.B. 544, *per* Collins, M.R., at p. 554.

At advising—

LORD JUSTICE-CLERK—The facts in this case as averred by the pursuer are, shortly stated, these. The pursuer was employed at work for the defenders on board a ship in Prince's Dock in Glasgow Harbour. He had been working as a casual labourer by the hour, and had concluded his work for the day, and left the ship and was upon the quay of the dock. Except that he had a right to demand wages for past work he had no relation to the defenders. At the time of the accident he was walking along the quay when a heavy stanchion fell over the side of the ship and injured him, the stanchion being part of a superstructure which had been put up on the deck of the ship, and was being removed by servants of the defenders.

In these alleged circumstances, which must of course be taken *pro veritate* in a question of relevancy, the pursuer maintains that if the stanchion fell upon him through the negligence of the defenders' servants, they are liable to his suit for damages in respect of the injuries he suffered.

The Sheriff-Substitute has held on the facts averred and admitted by the pursuer that "when the accident occurred the relation of master and servant between the pursuer and defenders had not ended for the day."

I am unable to agree with this opinion. As I read the pursuer's averments they mean that from the moment when the pursuer having ceased work and left the ship there was no longer any right in the master to the pursuer's services, nor any right in the pursuer to maintain that he was in the master's service, and entitled to the rights of a servant until he either resigned or was legally discharged from the service. The master had no longer any right to call upon him to do any work, and the pursuer had no right to demand to do work for wages, and to ask damages if he was not allowed to work, and therefore not allowed to earn wages under his engagement. Had the master when work was over at 6 o'clock, and the pursuer had gone on to the quay on the way from his work, ordered the pursuer to do something, can it be said that the pursuer would have been in breach of a contract of service had he declined and gone his way. I do not think it is possible so to hold. He was not on the master's premises or in the ship in which he had engaged to work. He was on the quay of the Clyde Trust. The time during which he had engaged to work had expired, and he was a free man to do what he pleased with his person and his time. He could have said on the spot, as he says on record, that "the relationship of master and servant did not then exist between the pursuer and the defenders." If at the place at which the stanchion fell on him someone had come up and offered him work, he would have been quite free to take it on the spot. He would not by doing so have been breaking any contract of service then existing. He owed no obedience, and the defenders had no right to exact any obedience from him.

Unless, therefore, there are some exceptional circumstances to be gathered from the pursuer's averments which may give the general circumstances a different complexion, I can see no ground for holding that the pursuer must be considered to have been a servant of the defenders, and therefore liable to the exception at common law, that the accident having been caused by a fellow workman, for that cause he can have no relevant case against the master. Several cases were referred to, but with one exception they do not appear to me to touch the present case. In the case of *Bryden* v. *Stewart* the injured man was in course of being carried in the mine cage to the surface of a coal pit when he met with his injury. And a similar case was that of *Burr* v. *Theatre Royal, Drury Lane*, where a chorus girl, still in the theatre, was injured while leaving the stage after the performance. I do not see how in these cases any other decision could have been arrived

at than that the injury occurred in the course of the employment, while the person injured was still subject to the master, and bound to carry out the rules applicable to workers on his premises. In the one case the discipline of the mine, and in the other the discipline of the theatre, applied until the employee was clear of the premises. From the time of entering the premises until leaving the premises the relation of master and servant directly existed. This was extended in the decision in *Blovelt* to the case of a man who remained on the premises at the dinner hour and took his meal there. Here again the person injured was on the premises of the master during an interval in the active work, but if the master and servant made it part of the arrangements of the service that the servants might stay on the premises while taking food to enable them to continue their work, it seems only reasonable to hold that the relation of master and servant was not broken off, so as to make it right to hold that an accident happening within the premises during the dinner hour was not an accident occurring in the course of the employment. The discipline of the work still applied to the employee. The servant would necessarily be subject to the master's orders as to where he should go on the premises to eat his dinner, and he was entitled to rely on care being taken that there should be no danger of accident to him at the place where he might sit down to eat his dinner. In that case a wall under which the man was sitting fell on and injured him. In my opinion that decision forms no precedent for the present case. The servant who was on the premises for work was allowed by the master to take his meal on the premises, and thus was on the premises by arrangement between the master and himself at a necessary interval in doing the work of the employer, and therefore might quite reasonably be held to have received the injury while in the employment. Here there was no work to be done, and the pursuer was not at a place where he was under the control of the employer. The same reasoning seems to apply to the case of *Sharp* v. *Johnston & Co.* There for the convenience of the master men came down some distance from London at an early hour, and after entering the master's premises were able to get some food before commencing their work. There it was held, and rightly as I think, that the workman was in the course of his employment. It was only as an employee that he could enter the premises. His position as a mere citizen ceased when he passed into the premises in which he had engaged to do work, being thus under the control of the employer, and bound to obey the employer's rules and directions as a servant in his master's premises. He is not in the employment merely at the time when he is actually at the moment doing work. Being there within the premises to do his work, he is there in the course of his employment, and in the language of the recent statute his presence there arises out of the employment.

There was only one other case referred to by the defenders' counsel, and it is a case peculiar in its circumstances. A miner was discharged at a time when it was not possible for him to go down the pit to bring up the tools, which it was part of his contract of service that he should give in at a certain place before leaving the service. To fulfil this obligation he returned on a subsequent day and went down the shaft to get the articles he was bound to return before leaving. It was held that in doing this he was in the course of his employment. It was obvious that he was so, for what he was engaged upon at the time of the accident was something which he must do in order to be free to maintain that the duties he had undertaken were performed and finished. I am unable to see how that case can affect the decision here, where (1) there was nothing to be done of the nature of service, and (2) the pursuer was not in a place over which the defenders had any rights as employers of labour.

But it is maintained that it being admitted by the pursuers that the defenders had a pay-box at which wages were paid on the quay and that he was going to that pay-box, that fact is sufficient to justify its being held, as the Sheriff-Substitute does, that "the relation of master and servant between the pursuer and the defenders had not ended for that day, as the defenders had the duty of paying his wages to fulfil towards the pursuer." This seems to me to be based on a mistaken idea, the word duty being used in a sense not applicable to a question of subsisting contract of service. Carried out to its limit, it would mean that no contract of employment can come to an end until the reward for the services rendered has been paid. That of course could not be maintained. If a servant was still in an employment until he had got his wages, it would lead to most anomalous results. Can the fact that there was a pay-box near at hand make any difference? I cannot think so. If the place for pay had been at an office some distance away, would not the law be the same? The law cannot vary according to the distance of the pay place from the place of work. The true question is, Can two persons be in the relation of employer and employed when the one has ceased to have any right to exact services and the other has no duty to render services? I cannot hold that the character of servant can adhere to a man merely because he has a claim for payment for past services. A master can cause a servant to cease to be his servant by dismissing him, and he cannot insist on remaining in the service until he is paid. So much so that if he is dismissed and the master refuses his wages because of alleged fault, he is bound to endeavour to get other employment, and can only insist (if fault cannot be proved against him) for past-due wages and damages to the extent to which he has been unable to get immediate or as lucrative employment. Whenever the servant is dismissed or the time for which his

engagement was made has expired, the position of employer and employed ceases unless there be, as in the case of *Cowler*, some act still to be done on the master's premises which has been undertaken in the contract, without the completion of which the obligations undertaken as part of the contract of service cannot be completed. There is no such case here.

On these grounds I would have your Lordships to recal the interlocutor under review, and to remit back to the Sheriff Court for probation.

LORD LOW—I have had the advantage of reading the judgment of the Lord Justice-Clerk, and I entirely concur.

LORD ARDWALL concurred.

LORD DUNDAS was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and remitted to him to proceed as accords and to allow a proof.

Counsel for Pursuer (Appellant)—Blackburn, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Defenders (Respondents)—Wilson, K.C. — Hon. William Watson. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 28.

SECOND DIVISION.

BURNETT'S TRUSTEES *v.* BURNETT AND OTHERS.

Succession—Vesting—Limited Fee—Bequest to A, with Limited Powers of Disposal, and the Heirs of His Body, whom failing to B and C equally between Them and their Heirs and Assignees whomsoever—Death of A without Issue predeceased by B and C—Whether Heirs of B and C or Testamentary Assignees of B and C Entitled to Succeed—Conditional Institution.

By *mortis causa* disposition a testator disponed certain heritable property to A and the heirs of his body, whom failing to B and C equally between them, and their heirs and assignees whomsoever, but under the express condition that A should have no power to alienate or burden the property without the consent of B and C or the survivor of them. A survived both B and C, and died without leaving heirs of his body. On A's death a question arose between, on the one hand, the heirs of B and C, and, on the other hand, the testamentary assignees of B and C, as to which of them was entitled to the property.

Held, in a Special Case, that the fee vested in A *a morte testatoris*, that no right had vested in B and C which was transmittable to their testamentary assignees, and that the heirs of B and C were entitled to the property as conditional institutes under the testator's disposition.

John Alexander Burnett, Kennington Park, London, and another, trustees acting under the trust-disposition and settlement of the late Mary Erskine Burnett, Balbithan House, Aberdeenshire (*first parties*); Letitia Wilkins Burnett, Addleston, Surrey, and another, executors of the late Stuart Mowbray Burnett, Balbithan House aforesaid (*second parties*); and Alexander George Burnett of Kemnay, Aberdeenshire, heir-at-law of the said Mary Erskine Burnett; and John George Burnett of Powis, Aberdeenshire, heir-at-law of the said Stuart Mowbray Burnett (*third parties*), brought a Special Case, to determine their rights under a *mortis causa* disposition of certain heritable property in Aberdeen by the late Mrs Helen Burnett or Bannerman, who died on 23rd April 1864.

By the *mortis causa* disposition, dated 6th September 1854, the property was disponed "to and in favour of Charles John Burnett, presently residing in Edinburgh, my nephew, and the heirs of his body, equally among them, but with and under the special provision and declaration after mentioned; whom failing to and in favour of Mary Erskine Burnett, my niece and his sister, also presently residing in Edinburgh, and Stuart Moubray Burnett, at Cairnton, in the parish of Kemnay, my nephew, equally between them and their heirs and assignees whomsoever, heritably and irredeemably, all and whole that piece of ground lying in the Chanonry of Old Aberdeen. . . . But providing and declaring, as it is hereby specially provided and declared, that these presents are granted and to be accepted of under this express condition, that the said Charles John Burnett shall have no power or liberty to sell, alienate, or dispone said piece of ground and others before disponed, either onerously or gratuitously, or to borrow money on the same, whether he has lawful children or not, without the express consent of the said Mary Erskine Burnett and Stuart Moubray Burnett or the survivor of them, and all deeds granted by him without the consent of them or the survivor are hereby declared null and void so far as they can affect the property disponed. . . ."

Mrs Bannerman was survived by Charles John Burnett, who died on 12th August 1907 without leaving heirs of his body and without having executed any deed affecting the said heritable property. She was also survived by Mary Erskine Burnett and Stuart Moubray Burnett, who died respectively on 25th April 1890 and 9th January 1893, both leaving testamentary writings dealing with their whole estates.

The first and second parties *maintained* that Mary Erskine Burnett and Stuart Moubray Burnett were entitled each to a one-half *pro indiviso* share of the subjects either absolutely or subject to defeasance only in the event of Charles John Burnett having heirs of his body; and that the right thus vesting in Mary Erskine Burnett and Stuart Moubray Burnett passed to their respective testamentary trustees and executors, or executors and legatees in heritage, and was or became