given out perfectly sound and sufficiently closed to exclude the risk of explosion. They are handed out to the men when they reach the place where the lamps are kept.

The Sheriff-Substitute has held that up to this point the man was not engaged in his employment. I must say I think that is right. There are only two ways of looking at it. Either you must have a rule that the moment a man enters the premises of his master he is then in the course of his employment; or you must have a rule that he must come to some point at which he enters upon the work which he has to do, and that only then does he begin to be in the course of his employment.

Whatever may be said about some of the cases quoted to us—and I feel bound to say that I have very grave doubt about the soundness of some of them—I do not think that we impinge upon their authority by deciding in this case that the Sheriff-Substitute was justified in holding, as he did as matter of fact, that the accident did not arise out of and in the course of the employment of the pursuer, and therefore that he was not entitled to receive compensation.

LORD ARDWALL — I am of the same opinion. The Sheriff-Substitute, as arbitrator, decides most distinctly that the miner's duties on this occasion were those of a miner underground, and that these duties did not begin until he reached the lamp cabin and obtained the safety lamp. That being a finding in fact, I cannot see how the arbitrator could come to any other conclusion in law than that which he did. I therefore think, along with your Lordships, that the question must be answered in the negative.

LORD LOW and LORD DUNDAS concurred.

The Court answered the question of law in the negative.

Counsel for the Appellant—Morison, K.C. —Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents—Horne—Strain. Agents—W. & J. Burness, W.S.

Friday, October 15.

FIRST DIVISION.

(SINGLE BILLS.)

ROGER *v.* J. P. COCHRANE & COMPANY AND ANOTHER.

Interest — Process — Damages — Petition to Apply Judgment of the House of Lords — Interlocutor of Lord Ordinary Giving Damages Recalled by Inner House but Restored by House of Lords — Claim for Interest from Date of Lord Ordinary's Interlocutor — Court of Session Act 1808 (48 *Geo. III, cap.* 151), *sec.* 19.

In an action of damages for infringement of letters-patent the Lord Ordinary awarded to the pursuer £1500. The Inner House recalled this interlocutor and assoilzied the defender, but the Lord Ordinary's interlocutor was restored by the House of Lords, no mention of interest being made. The pursuer in his petition to apply the judgment of the House of Lords, asked, *inter alia*, for interest at 5 per cent. on the £1500 from the date of the Lord Ordinary's interlocutor.

Held that he was not entitled to interest.

The Court of Session Act 1808 (48 Geo. III, cap. 151), section 19, enacts—"If upon hearing the appeal it shall appear to the House of Lords to be just to decree or adjudge the payment of interest, simple or compound, by any of the parties to the cause to which such appeal relates, it shall be competent to the said House to decree or adjudge the payment thereof as the said House in its sound discretion shall think meet."

On 9th April 1907 James Henry Roger raised an action against J. P. Cochrane & Company, of 27 Albert Street, Edinburgh, and James Pringle Cochrane, sole partner of the said firm, concluding for interdict against the defenders from making, selling, advertising, or exposing for sale golf balls made in infringement of certain letters-patent granted in favour of Frank Hedley Mingay, and also for delivery to the petitioner of all golf balls in the defenders' possession or under their control, made in infringement of said letters-patent, and for payment to the petitioner of the sum of £5000 sterling with expenses of process.

On 7th November 1907 the Lord Ordinary (SALVESEN), before whom the cause depended, pronounced the following interlocutor—". . . Finds that the defenders have made and sold, in the United Kingdom, between 1st September 1906 and 30th September 1907, 20,010 dozens golf balls, under the name of the "Ace" ball: Finds that said balls are manufactured in terms of the letters-patent . . . belonging to the pursuer: Finds further that the defenders are liable to pay damages in lieu of royalty to the pursuer in respect of the manufacture and sale of said balls at the rate of one shilling and sixpence per dozen balls, amounting in all to £1500, 15s.; decerns against the defenders to make payment to the pursuer of the said sum of £1500, 15s.: Further, in respect the defenders hold a licence for the manufacture of balls under the said patent, dismisses the conclusions of interdict; and decerns. . . ."

On 14th November 1907 the defenders reclaimed to the First Division of the Court of Session.

On 14th July 1908 the First Division recalled the interlocutor of the Lord Ordinary, assoilzied the defenders from the conclusions of the summons, and decerned.

The pursuer appealed to the House of Lords, and after hearing counsel for the parties, the Lords on 11th May pronounced judgment in the following terms:—". . . It is ordered and adjudged by the Lords Spiritual and Temporal in the Court of Parliament of His Majesty the King

assembled, that the said interlocutor, of the 14th day of July 1908, complained of in the said appeal, be, and the same is hereby, reversed, and that the interlocutor of Lord Salvesen of the 7th day of November 1907 thereby recalled be, and the same is hereby, restored: And it is further ordered that the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment: And it is further ordered that the respondents do pay, or cause to be paid, to the said appellant the costs of the action in the Court of Session, and also the costs incurred in respect of the said appeal to this House—the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments. . . ."

In a petition to apply the judgment of the House of Lords the pursuer prayed the Court "to find the defenders liable to pay to the petitioner the sum of £1500, 15s. as damages in lieu of royalty in respect of the manufacture and sale of said infringing golf balls between 1st September 1906 and 30th September 1907, with interest thereon at the rate of five per centum per annum from the date of Lord Salvesen's said interlocutor, viz., 7th November 1907, and to decern therefor against the said J. P. Cochrane & Company, and James Pringle Cochrane, as sole partner foresaid; to find the said defenders liable to the petitioner in the expenses incurred by him in the Court of Session, including the expenses of this petition. . . ."

Argued for the petitioner—The Lord Ordinary's interlocutor constituted the debt, and a debt bore interest when payment was wrongfully withheld—*Wallace* v. *Geddes*, June 13, 1821, 1 Sh. Ap. 42; *Carmichael* v. *Caledonian Railway Company*, June 28, 1870, 8 Macph. (H.L.) 119, *per* Lord Westbury at 131, 7 S.L.R. 666.

The Court did not call upon the respondent.

LORD PRESIDENT—In this case, which was an action of interdict and damages, the Lord Ordinary on 7th March 1907 pronounced an interlocutor whereby he found the defenders liable in damages, which he assessed at £1500, 15s., and decerned against them to make payment of that sum to the pursuer. Against that interlocutor a reclaiming note was taken to your Lordships' Court, and your Lordships reversed that judgment and assoilzied the defenders. Against that an appeal was taken to the House of Lords, and the House of Lords reversed the decision of this Court and restored that of the Lord Ordinary.

The pursuer now comes and asks to have the judgment of the House of Lords applied. In ordinary form that would simply consist in pronouncing an interlocutor in conformity with that judgment, and repeating the interlocutor of the Lord Ordinary with a decerniture, so that the pursuer could obtain extract and enforce payment of the sum to which he has been found entitled. But the pursuer asks that we should add to our decree a decerniture for interest from the date of the Lord Ordinary's interlocutor to the present time. No precedent has been quoted to us for such a decree, and I do not think that any of your Lordships can remember in your experience of such a thing ever having been done. The chief consideration against it, to my mind, is that if such a decree had been competent the matter would constantly have come up in reclaiming notes. For if the judgment of the Division was in affirmance of the Lord Ordinary's decision, the pursuer could always have said that he had been damnified by being kept out of his money from the time of the Lord Ordinary's interlocutor until a decision had been given by the Inner House. None of your Lordships can remember such a consideration having been given effect to, and so I think we may conclude that the practice is quite the other way. On principle, too, I should have thought that as the right of appeal is given to the subject there is no wrongful withholding of a debt on his part if he exercises that right.

But the matter is, I think, made quite clear by section 19 of the Court of Session Act 1808 (48 Geo. III, cap. 151), to which our attention was called. That is a special statutory provision giving the House of Lords power to make an award of interest. It seems to me that that indicates quite clearly that if a litigant is kept out of his money for a long period and thinks he is entitled to interest, he must move for it in the House of Lords and not here. I think, therefore, that we should pronounce an interlocutor applying the judgment of the House of Lords in ordinary form.

LORD KINNEAR—I agree with what your Lordship has said. All that we can do is to pronounce a formal order to give operative effect to the judgment of the House of Lords, but that is to the judgment of the House of Lords as we find it. Now what we are asked to do here is to give decree for something over and above what the House of Lords has found to be due, and over and above what the Lord Ordinary, whose judgment the House of Lords has restored, has found to be due. That I think we cannot do, but we must apply the judgment of the House of Lords just as it is.

LORD JOHNSTON — Where an action is raised for recovery of debt, the summons concludes for a definite sum of money and interest from the date of citation or of decree as the case may be; where it is an action of damage, it merely concludes, as here, for a lump sum as damages. The Lord Ordinary's judgment in such a case is equivalent to the application of the verdict of a jury, and such a judgment, as I understand, only bears interest from the date when it becomes enforceable. Now this judgment was not enforceable until the House of Lords had given its decision and this Court came to apply the judgment. When the House of Lords came to give its decision, if the pursuer thought that owing

to the delay involved in the appeal the sum contained in the Lord Ordinary's interlocutor was insufficient to meet the justice of the case, he should have asked the House of Lords to increase it by adding interest or otherwise. This he failed to do; therefore I think that in principle, as well as in view of the statutory provision in the Court of Session Act 1808 (48 Geo. III, cap. 151), section 19, to which the Clerk of Court called our attention, we can only grant a decree in the exact terms of the Lord Ordinary's interlocutor, which the House of Lords have in effect affirmed.

LORD M'LAREN was absent.

The Court refused the prayer of the petition so far as relating to interest.

Counsel for the Petitioner—Moncrieff. Agents—Paterson & Salmon, Solicitors.

Counsel for the Respondents—Munro. Agents—W. & J. Burness, W.S.

HIGH COURT OF JUSTICIARY.

CIRCUIT COURT, PERTH.

(Before Lord Guthrie and a Jury.)

Tuesday and Wednesday, June 8 and 9.

H.M. ADVOCATE *v.* EDMONSTONE.

Justiciary Cases — Murder — Culpable Homicide — Insanity — Responsibility of Panel—Mental Deterioration—Epilepsy—Mental Deterioration of Panel, not Amounting to Insanity, justifying Verdict of Culpable Homicide.

At the trial of a person charged with murder, who, it was proved, had been subject to epilepsy but was not wholly irresponsible for his actions, and on whose behalf a plea of insanity at the time had been advanced, the jury were directed by the judge to consider as a question of fact whether the panel's responsibility was so diminished by enfeeblement of mind as to reduce the crime from murder to culpable homicide. The panel was convicted of murder as libelled.

Justiciary Cases — Murder — Proof — Insanity—Evidence of Insanity of Panel's Ancestor.

At a trial for murder *held* incompetent to lead evidence to show that an ancestor of the panel had been confined in a lunatic asylum.

Alexander Edmonstone was indicted for murder of Michael Brown, a lad of sixteen. He pleaded not guilty, and specially that he was insane at the date of the alleged crime. It was established at the trial that Brown, who was conveying a considerable sum of money to the village of Wemyss, was killed in or about a urinal in that village by the panel; that the panel subsequently escaped, taking with him the watch and chain of the deceased and a considerable sum of money, and that after disposing of his clothes, which were blood-stained, and purchasing others, he ultimately reached Manchester, where he lived for some time, taking lessons in driving motors, and without his demeanour giving any indication of insanity. He was ultimately recognised and arrested.

In defence it was sought to be shown that the panel was an epileptic. It was proved that in the summer of 1908 he had a fit which was attributed to sunstroke, for which he was treated in hospital, and that he had had one or two fits during the following winter. It was shown, however, that his mental powers and power to work were unimpaired. It was maintained that he was a "degenerate" who was not wholly responsible, but on the medical evidence it was admitted that he was not wholly insane.

During the examination of the panel's mother as a witness for the defence, counsel for the panel proposed to put the following question—Was your father, the maternal grandfather of the panel, confined for a long time in Morningside Asylum? This question was objected to as incompetent by the Advocate-Depute, who referred to Macdonald on Criminal Law, p. 468, and cases there cited.

Argued for the panel—This was a question as to a fact and not one of law, and might competently be put to the witness. It was true such a question had sometimes been rejected in Scotland. But in England the sounder view had been taken that the mental history of a progenitor was an important matter of fact which should not be excluded. This view of the law had been followed in England since the opinion of Maule, J., in *Reg.* v. *Ross Tucket*, 1844 (Cox's Criminal Cases, No. 61, p. 103).

LORD GUTHRIE—The reason for which the Courts of Scotland have rejected such a question as is proposed is that it is not possible to enter upon an inquiry within an inquiry. One would need to know the reasons for which the ancestor had to be restrained, and these may have nothing to do with the case in hand. The cause might be brain lesion in the case of the ancestor, or drink, or another cause which may have no bearing whatever on the case which is being tried. That separate inquiry into why the ancestor was insane cannot be entered upon. The decisions, too, are binding upon me. I reject the question.

LORD GUTHRIE, in charging the jury, said—It is not disputed that the prisoner killed Brown. No one says that he was justified. Was he insane at the time? That is the special plea for the defence; and having heard the witnesses you can have no doubt that that plea must be negatived. No one says that his mental condition was such that he was wholly irresponsible for his actions. That leaves the one question, If he was not insane when he committed the crime, was the crime which he committed murder or culpable homicide? Is he to be taken as