ment, and that, I think, is in effect what we are here asked to do. The writing of 21st December is therefore in my judgment inoperative and ineffectual, and I am for answering the first question put to us in the negative.

I should like, however, to add that the conclusion I have reached as matter of law does not, in my opinion, result in any miscarriage of justice; for if the extrinsic evidence could competently be regarded, it would not, in my opinion, be relevant or sufficient to show an intention on Mrs Hannay's part other than that to which effect will be given, if your Lordships agree with my conclusion. The draft of Mrs Hannay's settlement was sent to her on 4th December. Next day she wrote a letter addressed to her agents which shows that she had it in her mind to leave the £1500 to the Keith family if her daughter died unmarried. But this letter was never sent; it was docqueted and retained by Mrs Hannay. She executed her settlement on 16th December; it contained no such provision as she had contemplated for the Keith family, but in returning it to her agents she says she would like added to the will a codicil to the effect that if her daughter died childless she left the £1500 otherwise than to her son and his heirs; and on 17th December she refers to the "probability under certain contingencies of bequeathing £1500 to others than my son's family." The agents on 17th and 19th December advised that instead of a codicil or codicils the settlement should be rewritten. On 21st December Mrs Hannay put on paper the writing in question, reverting apparently to her idea of a codicil. But on the 29th, eight days later, she writes to her agents—"In the event of my daughter's leaving no direct heirs, I might not leave the whole of the £5000 five thousand pounds to go to my son or family. I reserve the right of bequest otherwise for a portion and without meantime specifying amount or direction." It is exceedingly difficult to reconcile this passage with the view that Mrs Hannay believed and intended when she wrote it that she had already validly bequeathed the £1500 to the Keiths. When the new settlement was sent to her, containing the colourless clause already quoted, she executed it without comment on 13th January. In these circumstances I confess I see no reason to suppose that Mrs Hannay regarded the writing of 21st December as a valid and subsisting provision; and the contrary view is further supported by the fact that on 28th May 1912 she made a bequest to the Keith family, as to the validity of which no doubt is suggested. [*His Lordship then proceeded to deal with questions in the case with which this report is not concerned.*]

The LORD JUSTICE-CLERK, LORD SALVESEN and LORD GUTHRIE concurred.

The Court answered the question of law in the negative.

Counsel for the First and Fifth Parties—R. Scott Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Second Parties—A. M. Mackay. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Party—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Counsel for the Fourth Party—A. R. Brown. Agents—Cowan & Dalmahoy, W.S.

Tuesday, January 21.

FIRST DIVISION.

GRAHAM *v.* BARR & THORNTON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising Out of and in Course of the Employment—Miner Returning Home from Pit.*

A workman who was employed as haulage man in a coal mine, and whose duties were entirely underground, had finished his work for the day, and was returning homewards by a track alongside of a branch railway belonging to the colliery, when, at a place about 400 yards from the shaft mouth and 280 yards from the colliery office, he was knocked down and killed by a passing engine.

Held that the accident did not arise out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906.

Mary Robertson or Graham, residing at East Benhar, Fauldhouse, Linlithgowshire, widow of John Tennant Graham, coal miner, *appellant*, claimed, in the Sheriff Court at Linlithgow, compensation (1) as an individual, and (2) as tutrix for two pupil children of her marriage with the said John Tennant Graham (hereafter called the deceased), under the Workmen's Compensation Act 1906, from Barr & Thornton, coalmasters, Cultrig Colliery, Fauldhouse, *respondents*, and being dissatisfied with the determination of the Sheriff-Substitute (MACLEOD), appealed by Stated Case.

The Case stated—"Parties were agreed that if the appellant was entitled to an award the amount thereof ought to be £234, 0s. 10d.

"The following *facts* were admitted or proved to my satisfaction—1. The deceased was a haulage man in the employment of the respondents, who are coalmasters at Fauldhouse, at their No. 1 Cultrig Pit. 2. There are no boundaries to mark the extent of surface occupied by the respondents, but in the immediate vicinity of the mouth of the shaft of the said pit the respondents had the usual surface colliery properties. The respondents had a colliery office about 120 yards to the west of the shaft mouth, and a private branch railway line (also the respondents' property) took the traffic westwards from the sidings at the mouth of the shaft to another private branch railway line in the joint occupation of the respondents and of the United Collieries, Limited, and thence to a branch

line of the North British Railway. 3. The after-mentioned accident to the deceased took place at a point on the respondents' said private branch railway line about 400 yards to the west of the shaft mouth and 280 yards to the west of the said colliery office. Between the said colliery office and the point of the accident there was no property belonging to the respondents except their said private branch railway line. 4. The deceased's duties were entirely underground, and as soon as he stepped out of the cage at the mouth of the shaft his employment for the day was over, and he was at liberty to proceed at once from the shaft mouth to his home at East Benhar. (This paragraph makes a general statement.) 5. And, in particular, on the day libelled, when the deceased had finished his work for the day and had stepped from the cage on reaching the mouth of the shaft, his duties for that day were entirely over, and accordingly he proceeded from the mouth of the shaft to his home at East Benhar. 6. The deceased had a choice of two routes from the mouth of the shaft to his home. One route consisted of a beaten track across the moor, but this route, though shorter and not exposed to danger from railway traffic, was used by very few of the respondents' workmen. Indeed, except in summer time and after a long spell of dry weather, it was not at all a very attractive route, by reason of the depth of mud on its surface. The route which the deceased generally took was the one which the great majority of the respondents' workmen generally followed, without either the sanction or the prohibition of the respondents. It consisted of a beaten track along the side of the respondents' said private branch railway line, and was so smooth and comfortable that many bicycles were in the habit of traversing it. 7. The deceased, following his usual custom, proceeded homewards on the date libelled from the mouth of the shaft by the said beaten track along the side of the respondents' said private branch railway line, and when at a point on the respondents' said private branch railway line about 400 yards from the mouth of the shaft he was knocked down and killed by an engine belonging to the North British Railway which worked the traffic for the respondents. 8. At the time libelled the appellant and her said two children were the only dependants on the earnings of the deceased, and they were wholly dependent thereon.

"On the foregoing facts I inclined in law to the view (1) that though the deceased chose to go homewards from the mouth of the shaft by the respondents' private branch railway rather than go by the other route across the moor, yet in the circumstances the mere choice of route (distinguishing this case from that of *Hendry* v. *United Collieries, Limited*, 1910 S.C. 709) was not fatal to the appellant's claim; but (2) that on consideration of the question as to the existence of any relationship between the accident at the spot where it happened and the deceased's employment with the respondents, the accident could not be said to have arisen out of and in the course of that employment without disregarding two Scottish decisions, viz., *Caton* v. *Summerlee and Mossend Company*, July 11, 1902, 4 F. 989, and *Anderson* v. *Fife Coal Company, Limited*, 1910 S.C. 8, and having so decided, I assoilzied the respondents with expenses."

"The *question of law* for the opinion of the Court is—Was I right in deciding that the accident to the deceased did not arise out of and in the course of his employment with the respondents?"

Argued for the pursuer—The accident arose out of and in the course of the employment. It had been held long ago at common law that employment continued after actual work had ceased until the miner was safely out of the mine—*Brydon* v. *Stewart*, March 13, 1855, 2 Macq. 30, *per* Lord Chancellor Cranworth, at pp. 35 and 37—and similarly, a workman did not cease to be in the course of his employment, in the sense of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), the moment his effective work had ceased—*Todd* v. *Caledonian Railway Company*, June 29, 1899, 1 F. 1047, 36 S.L.R. 784; *Gane* v. *Norton Hill Colliery Company*, [1909] 2 K.B. 539—and conversely, a workman might come into the employment before commencing actual work—*Mackenzie* v. *Coltness Iron Company, Limited*, October 21, 1903, 6 F. 8, 41 S.L.R. 6; *Sharp* v. *Johnson & Company, Limited*, [1905] 2 K.B. 139; *Cross, Tetley, & Company* v. *Catterall*, not reported but referred to in *Sharp* v. *Johnson & Company, Limited*, at p. 145. *Caton* v. *Summerlee and Mossend Iron and Steel Company, Limited*, July 11, 1902, 4 F. 989, 39 S.L.R. 762, and *Anderson* v. *Fife Coal Company, Limited*, 1910 S.C. 8, 47 S.L.R. 3, were wrongly decided, as they proceeded on the view that employment in the sense of the Act ceased with work. The workman was still on his master's premises when the accident occurred, and in fact the accident, being on the private branch railway of the colliery, occurred within the mine—Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), sections 111 and 122. In any case, even if the accident occurred outside the mine and off the employers' premises, it was so close that the workman was still in the employment; for a reasonable margin must be allowed—*Hoskins* v. *Lancaster*, 1910, 3 Butterworth's C.C. 476; *Sharp* v. *Johnson & Company, Limited* (*cit. sup.*); *Cross, Tetley, & Company* (*cit. sup.*). The ratio of *Davies* v. *Rhymney Iron Company*, 1900, 16 T.L.R. 329, was doubted by Lord Shaw in *Coldrick* v. *Partridge, Jones, & Company, Limited*, [1910] A.C. 77, at 82.

Argued for the defenders and respondents—(1) The accident did not arise in the course of the employment. They admitted that employment did not necessarily end with the cessation of actual work, and that a reasonable margin must be allowed, but, on the other hand, it did not last until the workman had

returned home. They submitted that 400 yards from the shaft mouth and 280 from the colliery office was outside any reasonable margin, and cited the following cases—*Caton* v. *Summerlee and Mossend Iron and Steel Company, Limited* (*cit. sup.*); *Anderson* v. *Fife Coal Company, Limited* (*cit. sup.*); *Walters* v. *Staveley Coal and Iron Company*, May 30, 1911, 49 S.L.R. 623; *Gilmour* v. *Donnan, Long, & Company, Limited*, 1911, 105 L.T.R. 55; *Hendry* v. *United Collieries, Limited*, 1910 S.C. 709, 47 S.L.R. 635; *Davies* v. *Rhymney Iron Company, Limited* (*cit. sup*). *Hoskins* v. *Lancaster* (*cit. sup.*) was not inconsistent with *Anderson* (*cit. sup.*). (2) The accident did not in any case arise out of the employment, for it was not an ordinary risk incidental to it—*M'Laren* v. *Caledonian Railway Company*, 1911 S.C. 1075, 48 S.L.R. 885; *Kelly* v. *The Owners of the "Foam Queen,"* 1910, 3 Butterworth C.C. 113; *Kitchenham* v. *Owners of s.s. "Johannesburg,"* [1911] 1 K.B. 523, [1911] A.C. 417.

At advising—

LORD PRESIDENT—This is an appeal by Stated Case against the judgment of the arbiter, who held that an accident which caused the death of a workman in the employment of Barr & Thornton, coalmasters, Fauldhouse, did not arise out of and in the course of his employment. The man was killed by a passing engine while walking alongside a colliery branch railway which leads from the colliery to the North British Railway.

The case was pled to us as if it raised a question of principle. I do not think it does. I think that the law, so far as there is law in the matter, is quite well settled, and that all these questions are really, not perhaps in all cases strictly questions of fact, but at all events questions which depend upon the view that is taken of facts, and accordingly I should be unable to alter the judgment unless I thought that there were no facts on which it could be supported. So far from that being the case, I should myself, if I had been arbiter, have taken the same view of the case as the arbiter here did.

The deceased man had finished his work for the day. He was an underground worker, and, as is found in the case, when he stepped out of the cage at the top of the pit his day's work was over. Now I am of opinion that that is not a decisive fact; it is one fact in the case, but it is quite certain that there is a margin—I may call it a margin both of time and of place—which is allowed to the workman after his day's work is over before you can say that anything that happens to him is no longer a happening arising out of and in the course of his employment. It is impossible to give a definition which would fit all circumstances, but the question may be tested, as these questions nearly always may be, by the interrogative method. You may say, "Was the man's work truly done?" and you may say, "Had he left the employers' premises?" But while I say that, I should like to make this remark, that while tests of this kind are helpful they are never conclusive. After all, the real criterion must be to use the words of the statute and ask, "Did the accident arise out of and in the course of the employment?" I think that it is immaterial whether you regard the margin as one of time or of place, because in a case like this the two things are only two different ways of looking at the one question, whether the man has finished his work. He has finished his work when he is no longer in his working hours and is in his playtime; he has finished his work when he has left his master's premises and is engaged in the ordinary journey home. Now there is the margin, and there is no doubt that if a man meets with an accident within the precincts of the works, that would be held, and has been held in many of the decided cases, to be an accident that arose out of and in the course of his employment, although the actual working hours were over or had not begun.

The question therefore depends on the view which is taken of the particular case. In this case the man had passed out of the immediate precincts of the works, and he was going along this branch railway, which he was only using as a convenient way of traversing the moor, there being other ways by which he might have gone. There was one way in particular which was seldom used because it was muddy, and I have no doubt that if he had lived at another point of the compass altogether he would have gone home over the moor itself, and as these pits are put down, so to speak, anywhere, there are no regular approaches to them. He had gone a considerable way down the railway, and I think it was perfectly right to hold that his work was done and that he was engaged in his ordinary walk home. The mere fact, as is found here, that the branch railway belonged to the colliery at the time is neither here nor there. There was a very good illustration of that proposition in the case of *Gilmour* v. *Donnan, Long, & Company, Limited* (4 Butterworth 279). If anything did turn upon it, I have no doubt that, though the railway did belong to the colliery, that does not mean that the ground on which the workman was walking was the property of the owners of the colliery, One knows that in the case of a colliery a right is given to the colliery owner to put down rails, and these are the property of the colliery company, but nobody ever heard of a strip of land a mile long being sold to a colliery company in the same way as it is sold to a railway company. But even if he had been on the company's ground it would have made no difference. I think this was a pure question of fact, which the Sheriff-Substitute decided in the right way, and that therefore his judgment should remain undisturbed.

I may say that if it were necessary to find facts in another case which are, so to speak, precisely similar to the facts here, I may refer to the case of *Caton* v. *Summerlee and Mossend Iron and Coal Company* (4 F. 989). I do not propose to go through all the

cases decided on this subject, because I do not think anything can be gained by doing so.

LORD JOHNSTON—This case arises out of the too familiar incident of a miner being injured when on his way home, returning from work. The Sheriff has found that the accident in question did not arise out of and in the course of his employment. The deceased was run over when walking home by a path alongside of a private line belonging to his employers, at a spot 400 yards from the pit-head and 280 yards from the colliery office.

The case is not like *Tod* v. *Caledonian Railway Company* (1 F. 1047), where an engine-driver, though he had finished his effective work, was bound to report himself at the local office of the company on his way home. That was the determining factor, and I do not think that the fact that his wages covered the time requisite for him to reach his home affected the liability.

Nor is the case like *Mackenzie* v. *Coltness Iron Company* (6 F. 8), where the site of the accident was properly within the access to the works. *Gane* v. *Morton Hill Colliery Company*, [1909] 2 K.B. 539, is another case of the same class. Nor is the case like that of *Hendry* (1910 S.C. 709), referred to by the Sheriff, where the accident happened within the purlieu of the works, but at a place which was not a proper access to them. What is the purlieu of the works is, and must be, in every case a question of circumstances.

The present case is on the same lines as *Caton* v. *Summerlee and Mossend Company* (4 F. 989) and *Anderson* v. *Fife Coal Company* (1910 S.C. 8), where the accident occurred after the miner, as here, had finished his work and left the premises in the widest sense in which these can be regarded, and was on his way home.

Each of this class of cases is one of fact, and I should have come independently to the conclusion that no exception could be taken to the Sheriff's determination, but it is satisfactory to know that in similar, almost identical, *species facti* the other Division of this Court have reached the same result.

The LORD PRESIDENT intimated that LORD MACKENZIE had authorised him to say that he concurred, and that owing to LORD KINNEAR'S illness, his opinion had not been obtained.

The Court answered the question of law in the affirmative.

Counsel for the Pursuer and Appellant—Dean of Faculty (Dickson, K.C.)—Kirkland. Agents — J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defenders and Respondents—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Saturday, December 28.

FIRST DIVISION.

(Before the Lord President and a Jury.)

SMITH *v.* PATON.

Process—Jury Trial—Slander—Latitude in Time of Utterance.

In an action of damages for slander the question put in issue was "whether on or about 12th March 1912 . . . the defender did falsely and calumniously say of and concerning the pursuer" certain words to the pursuer's loss, injury, and damage. At the conclusion of the trial the jury found that the defender had uttered the slander complained of, but that it had been so uttered in February 1912, whereupon the Lord President directed that the verdict should be entered for the defender.

Alexander Smith, *pursuer*, brought an action of damages for slander against Mrs Elizabeth Paton, *defender*.

On November 13, 1912, the Lord Ordinary (ORMIDALE) approved of the following issue, *inter alia*, for the trial of the cause:—"Whether, on or about 12th March 1912, and at or near the shop in Raise Street, Saltcoats, occupied by the pursuer, and in presence and hearing of Mrs M'Arthur, wife of Francis M'Arthur, hawker, Raise Street aforesaid, the defender did falsely and calumniously say of and concerning the pursuer 'You are harbouring the thief and his stolen property. Bring out the thief and his stolen property'—or did use words of the like import and effect, to the loss, injury, and damage of the pursuer."

The case was tried before the Lord President (DUNEDIN) and a jury on 28th December 1912.

At the close of the trial the jury retired to consider their verdict, and on their return stated that they found that the slander complained of had been uttered by the defender, but that it had been so uttered in February 1912.

The LORD PRESIDENT directed that the verdict should be entered for the defender.

Counsel for Pursuer—Crabb Watt, K.C. —J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for Defender — Watt, K.C. — Lippe. Agent—W. Croft Gray, S.S.C.