at another is not a danger which is incidental to employment in a coal mine, and it is certainly an act which is entirely outside of the scope of the employment. I am accordingly of opinion that the question of law should be answered in the negative.

LORD ARDWALL—The accident which gives rise to this case was a very regretable one, but the question which the Court has to decide is whether, in the words of section 1 (1) of the Workmen's Compensation Act 1897 the accident was one "arising out of and in the course of the employment" in which the workman was engaged. There is no question that it arose in the course of his employment, but the difficulty is with regard to the additional condition, which must be established in order to entitle him to compensation against his employers, namely, that it arose out of his employment.

I am of opinion that it did not, for the reason that it arose directly from the boy Paton throwing a handful of dust or rubbish at the pursuer, in avoiding which the pursuer suffered the injury complained of. It was certainly no part of Paton's employment to throw a missile at any of his fellow-workmen, nor was his doing so a risk incidental to the pursuer's employment which the employers might be supposed to have undertaken the chance of when they employed him. On the contrary, the throwing of the missile in question was a gratuitous piece of mischievous folly on the part of the boy Paton, and I cannot hold that it was such a piece of folly as is common among boys employed in mines.

I may add that, in my opinion, the present question is covered by decided cases, for I am unable to distinguish it, so far as principle is concerned, from the cases of *Falconer*, 3 F. 564, and *Armitage*, 1902, 2 K.B. 178. The latter case was very similar to the present, for there a boy named Smith pushed another boy named Harrop into a pit, and Harrop, becoming angry, picked up a piece of iron and threw it at Smith. It missed Smith and hit Armitage on the eye causing him considerable injuries, and there it was held that Armitage had no claim against the employers.

In the case of *Challis*, 1905, 2 K.B. 154, where an engine-driver was injured by being struck by the glass of the screen of the engine which had been broken by a stone wilfully dropped on a train by a boy from a bridge, the employers were held liable, on the ground that the risk of mischievous boys discharging missiles from bridges was a risk incidental to the employment of an engine-driver, and that the accident accordingly arose out of the employment; but that case, I do not think, can be held to apply to the present, because, as I have already said, the throwing of missiles by boys or others in mines at miners is not, according to common experience, a risk incidental to a miner's employment.

On the whole matter, I am of opinion that the accident arose, not out of the employment in which the pursuer was engaged, but out of the mischievous and illegal act on the part of the boy Paton, and that accordingly the only remedy he can have is against the wrongdoer, and not against his employers.

The Court found, in answer to the question, that the injury to the respondent was not one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1897, recalled the award of the arbiter, and remitted to him to dismiss the claim.

Counsel for the Appellants — M'Clure, K.C.—Horne. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent — Hunter, K.C. — Munro. Agents — Macpherson & Mackay, S.S.C.

Friday, February 7.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

WILSON *v.* POTTINGER.

Property — Agreement — Encroachment — Bar — Dean of Guild — Appropriate Remedy for Building Encroachment — Equitable Jurisdiction of Court—Facts Constituting a Bar to Objecting to Encroachment.

P., the owner of a building stance in a town, upon which he proposed to erect a four-storey building, after a meeting, wrote to W., his neighbour, who had, entirely on his own stance, a two-storey building—"With regard to the gable between your house and my ground that I am to build upon, I am prepared to pay you whatever you're entitled to. The amount can be agreed on between you and myself, or any other party that we may appoint, on your approving of my plans. Yours faithfully, P. I will make good any damage done to your property by my operations, P." W. gave consent.

P.'s intention was merely to have raised W.'s existing gable, but to meet the requirements of the Dean of Guild it was found it would be necessary to build, in part, the upper or new portion of a greater width than, and consequently projecting about 4½ inches beyond, the lower or old portion. The projection was to W.'s side. The plans bore W.'s signature, and showed, though not very distinctly, the alterations, but it was questioned if these were on the plans when W. signed. W.'s attention was never called to the proposed encroachment. After the building was erected W. brought an action to have P. ordained to remove it so far as it encroached beyond the old portion of the gable.

Held that W. was barred from now objecting to the encroachment—*Per* Lord President, on the ground that it must have been in the contemplation of both parties when the letter was written and received that the building operations proposed were building operations subject to the approval of the Dean of Guild, and W. had signed the plans as altered and approved by the Dean of Guild. *Per* Lords M'Laren and Kinnear, on the ground that the agreement between the parties was that P. might build upon the existing gable, and that that implied in the only possible way, viz., the way the Dean of Guild might allow.

Opinion that the remedy sought, *i.e.*, decree for removal, was inappropriate for such encroachment, the appropriate remedy being either timeous interdict or compensation under the equitable jurisdiction of the Court. *Sanderson* v. *Geddes*, July 17, 1874, 1 R. 1198; *Jack* v. *Begg*, October 26, 1875, 3 R. 35, 13 S.L.R. 17; and *Grahame* v. *Kirkcaldy Magistrates*, July 26, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893, *commented on* and *explained.*

On October 6th 1906 John Henry Cowan Wilson, baker, 34 Main Street, Newhaven, raised an action against John Pottinger, builder, 127 Trinity Road, Edinburgh. The summons concluded—"Therefore it ought and should be found and declared . . . (*Primo*) that the pursuer in virtue of his rights and titles is proprietor of all and whole that two-storeyed tenement, being Nos. 33 and 34 Main Street, Newhaven, in the parish of North Leith and sheriffdom of Edinburgh, consisting of a shop with flat above, together with bakehouse and oven behind the shop; and (*Secundo*) that the defender has unwarrantably and illegally encroached upon the said property of the pursuer, by building beyond the west gable of the pursuer's said tenement, and above the ground heritably possessed by the pursuer, to the extent of 4½ inches or thereby; and it being so found and declared the defender ought and should be decerned and ordained by decree of our said Lords to remove the said building erected by him so far as it encroaches upon the property of the pursuer beyond the west gable of the pursuer's said tenement. . . ."

The defender pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the action. (2) The pursuer having agreed to allow the encroachment complained of on payment of compensation as the same should be determined, failing arrangement, by arbitration, is barred from raising the present action."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (GUTHRIE), who, after a proof, on 1st April 1907 gave decree in terms of the first, second, and third conclusions of the summons, and continued the cause.

Opinion.—"The pursuer and defender are owners of adjoining buildings in Main Street, Newhaven. The pursuer built his house and shop of two storeys, with bakehouse and oven behind, in 1903, and the defender erected his four-storey premises in 1906. Both sites had been previously occupied by old buildings, jointly occupied on the lower floor, but divided by a wooden partition 9 inches thick. The pursuer's house lies to the east of the defender's.

"When the defender built in 1906 he used the pursuer's west gable as his east gable to its full height, namely, two storeys. At an interview on 26th June 1906, and by letter of that date (*v. supra in rubric*) it was arranged that the defender should obtain the further height required by him on the east by building on the top of the pursuer's west gable, compensation to be made as therein specified. Disregarding a stair, which, not being bonded into the wall, is not part of it, the breadth of the pursuer's west gable for a distance of at least 20 feet back from the street is 9½ inches. The defender proposed to heighten that part of the gable by building on it to the same breadth, but the Dean of Guild Court in Leith insisted, through the Burgh Surveyor, that the additional height should be 14 inches broad. Instead of the defender making the necessary projection of 4½ inches (being the difference between 9½ inches and 14 inches) on his own side of the gable, he, unfortunately, resolved to build so that while the additional height was flush on his own side with the gable as built by the pursuer, it projected on the pursuer's side 4½ inches—to that extent overlapping the pursuer's property. There were practical reasons in favour of this course, and the pursuer would have had no interest to refuse his consent had the matter been explained to him and his consent asked, on a proper offer of compensation. But, as I hold on the evidence (*v. opinions in Inner House where contrary held*), the defender, without obtaining the pursuer's consent, proceeded to build his 14 inch extension so as to project 4½ inches beyond the original gable, and over the pursuer's property. The pursuer objected, but the defender completed his operations in October 1906.

"The pursuer now asks removal of the building erected by the defender on the top of the pursuer's west gable to the extent, namely, 4½ inches, to which that building extends beyond the thickness of the pursuer's original gable, and over the pursuer's property. He, however, intimated at the proof, through his counsel, that he does not propose to enforce the decree, but desires only to obtain compensation.

"The dispute is a lamentable one. . . But I must decide the questions brought before me on their legal merits, protesting at the same time that if it were competent I should dismiss the summons, without costs to either party, on the principle *de minimis non curat prætor.*

"The condescendence and defences raise three questions—(1) was there in fact an encroachment of 4½ inches; (2) if so, was

this authorised by the pursuer; and (3) if not authorised, is the pursuer entitled to a decree of removing.

"As explained at the proof, although the defences do not make it clear, the defender admits that the pursuer's 9½ inch gable, so far as heightened by him and thickened to 14 inches, projects to the extent of 4½ inches over the pursuer's property. But he disputed the pursuer's right to decree, in terms of his second declaratory conclusion, because he maintains that the encroachment was not unwarrantable or illegal.

"The defender claims the pursuer's authority for his operations, first, from what passed in conversation between them on 26th June 1906, second, on the terms of the letter of that date [*v. supra in rubric*], and third, on the contents of the plans approved by the pursuer's docquet. As to the conversation alleged by the defender, his account is directly contradicted by the pursuer. As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side. As to the plans it is not proved that the alterations showing the thickened gable were on the plans when shown to the pursuer [*v. Lord President's opinion*]. But even if they were, these alterations are not so drawn as to give reasonable notice of intended overlapping to a man like the pursuer, and the front elevation is inconsistent both with the '1, 2, and 3 flat plan,' and with the roof plan.

"The question of the appropriate remedy remains. Although reluctant to give decree of removal I do not think the pursuer has done anything to bar himself from the remedy claimed. As I read the oral evidence and the correspondence it is not proved that he ever consented to the defender's operations, or that he failed timeously to object to them, or that he led the defender to think that he would be content with compensation and would waive his legal right to removal. Thus I do not find the element of bar or acquiescence which, in one form or another, was involved in the series of cases commented on by Lord Watson in *Grahame* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91. To refuse the pursuer the remedy of removal would be, in Lord Watson's words, 'to give the wrongdoer compulsory powers to acquire part of his neighbour's property, which, in spite of remonstrance, he had illegally appropriated.' . . .

"In these circumstances I have given decree in terms of the first three conclusions of the summons, and with respect to the fourth conclusion, namely, the period within which the defender is to remove the encroachment, I have continued the cause till the first sederunt day in May next."

On 4th June 1907 the Lord Ordinary pronounced this interlocutor:—"In respect that the defender has failed to remove the encroachment condescended on, and, further, that the parties have failed to agree as to the compensation to be paid in respect of said encroachment, or to the terms of an arbitration to fix the amount of compensation, therefore decerns and ordains the defender to remove the said encroachment within three months from this date, with certification that, failing his removing, as aforesaid, the pursuer will be entitled to get said removal effected at his expense, and continues the cause."

The defender reclaimed, and argued—The terms of the letter of permission showed that it was intended to provide for compensation rather than to make particular conditions about the method in which the wall was to be raised. (1) In these circumstances, and in view of the somewhat peculiar nature of the pursuer's western gable, the letter was a good warrant for raising the wall in any reasonable way. (2) Even if the projection of 4½ inches was, strictly speaking, *ultra vires*, the case was not one for removal, since the projection had not been made without a colourable title, but on the faith of a letter which the defender *bona fide* believed gave him the necessary authority. In this respect the case was *a fortiori* of the cases commented on in *Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R. (H.L.) 91, Lord Watson, at p. 91, 19 S.L.R. 893, viz.—*Macnair* v. *Cathcart*, May 18, 1802, M. 12,832; *Sanderson* v. *Geddes*, July 17, 1874, 1 R. 1198; and *Jack* v. *Begg*, October 26, 1875, 3 R. 35, 13 S.L.R. 17. The interlocutor of the Lord Ordinary should be recalled.

Argued for the pursuer (respondent)—The letter of June 26, to which the pursuer agreed, merely authorised building "on" his gable not "beyond" it. The *onus* was therefore on the defender to show that he had subsequently entered into some other agreement with the pursuer which authorised the encroachment now in question. This he had failed to do. The pursuer in signing the plans did not thereby consent to any such modification thereof as should be ordered by the Dean of Guild. The function of the Dean of Guild was to authorise building in a question with the builder, but his authorisation was of no effect as between the builder and an adjacent proprietor whose property was affected, without intimation being made to him or his consent being obtained. As to remedy, the defender had continued his operations in face of the pursuer's timeous objections, and the Lord Ordinary was right in giving effect to the *dictum* of Lord Watson in *Grahame* v. *Magistrates of Kirkcaldy, ut supra,* at 9 R. (H.L.) p. 93.

LORD PRESIDENT—This case arose out of the heightening of a small tenement in Newhaven. In order to heighten that tenement the person who is the defender in this case had of course to submit plans to the Dean of Guild Court. He proposed to make use of the gable which was between his property and that of his next-door neighbour on the east; but he seems to have been aware that, to say the least of it, there was great doubt, indeed I would be more correct to put it more strongly, and

to say he knew that the gable in question was not a mutual gable, and accordingly he approached his next-door proprietor for permission to build upon the gable. He was going to carry his own house to a height considerably greater than that of his next-door neighbour's, which only extended to two storeys; and the parties approached each other, and their negotiations were expressed in the following letter which was addressed by the defender in this case to the pursuer on 26th June 1906:— . . . (*quotes, supra in rubric*) . . . It is not disputed by the pursuer that to that letter, whatever it means, he agreed. There is a controversy between the parties as to whether any plans had been shown before that letter was written or not. I do not know that it matters. It is quite clear that at the time that letter was written the plans were before the Dean of Guild Court in their original condition; and to explain what that was I must give your Lordships a short description of them and of the gable wall in question. The gable wall in question was a 14-inch wall for a number of feet, measuring from the back of the tenement towards the front, but towards the front of the tenement the wall narrowed down from 14 inches thick to 9 inches. Now, it is undoubtedly the case that the defender's original idea was to utilise this gable wall as a medium wall to the ground storey, and also as a support to the tall gable on to which he was going to build a tenement. He undoubtedly meant originally merely to carry the gable up, that is to say, that where it was 14 inches it would be 14 inches, and where it was 9 inches it would be 9. After he had got this consent, the case proceeded before the Dean of Guild Court, who, acting upon what seems to be a general rule, insisted that as the tenement in question was to be a four-storeyed tenement, the 9-inch portion of the wall would not do, and that a 14-inch wall would be necessary all along. The defender inserted brackets at each end of the 9-inch wall, on which he placed an iron beam running parallel with the top of the wall, and then he carried the gable up for the additional thickness which was necessary, making it a 14-inch wall right up to the top. Now, in doing so, this iron beam makes an overhang of 4½ inches, which is over the pursuer's property; and the action is raised to have it declared that these 4½ inches belonged to him, and to have the defender ordained to that extent to take away the wall of his building. The Lord Ordinary has taken a view of the import of the letter which has prevented him from arriving at the conclusion which he has plainly indicated he wished to do. He says—"As to the letter, an arrangement for heightening a gable may, so far as consistent with safety, authorise building beyond the area of the gable, but only on the builder's own side." I do not think that is the proper view to take of the letter. Its construction is plain and simple. Looking to the whole surrounding circumstances, it seems to me perfectly clear that the meaning of the consent to the building on the gable was to a building on the gable of which the Dean of Guild Court should finally provide the authorised plans. Then there is no doubt the plans were altered, and I think it was clearly proved that the signature of the pursuer, which was adhibited to those plans, was adhibited after the alterations had been made. I agree that it may very well be that the pursuer, being a man unskilled in plans, did not, if I may use the cant expression, wake up to the fact that the alterations had been made, and that these 4½ overhanging inches were upon his property; but I do not think he can take any benefit from that. If he chooses to put his signature to a plan authorised by the Dean of Guild Court I think he takes his chance as to what this plan precisely showed. In other words, I do not, as the Lord Ordinary has done, first of all conclude that the agreement was for a gable wall of 9 inches, and then that there was a new arrangement for a gable wall of 14 inches. I look upon the agreement as for such gable as the Dean of Guild authorises, and then I find that what the Dean of Guild authorised was fairly brought to the pursuer's notice by the production of the plans. It is quite true that these plans are not strictly accurate, especially they are inaccurate in two particulars. In the first place, being evidently desirous of economising space, they make one plan do for the first, second, and third floors, and the one plan does not show the condition of each floor and its flooring level; and, in the second place, it is equally clear that the elevation is not accurately altered as it ought to have been, so as to make a corresponding alteration in the thickening of the wall. But although this minute criticism can be substantiated, at the same time I have no hesitation in saying that any man who understood a plan could see that it was meant to carry up a 14-inch wall which should overhang this space. I do not know that the pursuer understood that. He had no technical training, and plans are things that require a little training and some understanding; but if he chooses to sign a plan he takes the risk of misunderstanding it. It seems to me that that ends the case.

But I wish to say that even if I were not of that opinion the pursuer could not succeed. When you come to such a small question as the overlapping of a boundary wall by 4½ inches, I think the jurisdiction of the Court is as has been illustrated in the leading case of *Sanderson* v. *Geddes*, 1874, 1 R. 1198. I do not find that Lord Watson throws the slightest doubt on *Sanderson* v. *Geddes* in his judgment in *Graham* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91. On the contrary, what Lord Watson did not like was *Jack* v. *Begg*, 1875, 3 R. 35, and the issue in *Jack* v. *Begg* was very different from that in *Sanderson* v. *Geddes*; and *Sanderson* v. *Geddes* was entirely different from the case of *Graham* v. *Magistrates of Kirkcaldy*. But the Lord Ordinary, in quoting Lord Watson's dictum, confuses *Sanderson* v. *Geddes*, in which there was no transference of property at all, with *Begg* v. *Jack*, where there was

and ordains the defender to take down what has been put up. I think this is one of those cases (if I could project my mind a century or so after this, or if there is an earthquake and the buildings are demolished) in which the boundary will remain as before. This operation does not alter the boundary, and it is out of the question for the pursuer to insist that the building should be taken down. The only possible remedy was by making application for interdict when the building was being erected, and it is no answer to that to say that the pursuer's agent was ill. Accordingly, even if I had not come to the conclusion at which I have arrived, I should have thought the remedy was not an appropriate one. I propose that we should recal the Lord Ordinary's interlocutor and dismiss the action. I think probably that is a preferable course to assoilzieing the defender. I do not wish this action to be held as fixing anything as to the rights of parties in the gable. I therefore propose that we dismiss the action, and find the defender entitled to expenses.

LORD M'LAREN—As I agree with your Lordship I have little to add. The agreement was one which entitled the defender to build upon the pursuer's gable—that is, to derive support for his upper storeys from the pursuer's gable; and it is evident that the parties were not in a position to determine at the time of the agreement what would be the precise value of the support that was to be given or the damage that might be done, because that was left to be determined by arbitration. These are expressed conditions. There was another thing which both parties, I must assume, knew, that all building plans are subject to the control of the Dean of Guild Court, and therefore the contract must have been affected by the implied condition that the building was to be in such form as the Dean of Guild Court should order. These conditions, expressed or implied, seem to me to cover the whole ground, and to leave nothing to be pointed out, explained, or proved, supposing a proof were competent.

Then, on the other branch of the case, I think there is sufficient authority in the region of decision to show that we have to a certain extent at least adopted the principle of the Roman law, that a person who builds in good faith on another's property is not necessarily to be compelled to take down his building. If the value of the building greatly exceeds that of the ground he occupies, the case can be explicated by paying compensation, whatever may be the agreement. I should be sorry if any doubt were thrown upon the doctrine that, where there is an inconsiderable encroachment upon a neighbour's land by buildings which are substantially and for all practical purposes upon the builder's own land, the law of the land will not compel him to take it down. If the law were altered in this particular case, it would be one in which the application would be perhaps in the highest degree inequitable. To take down the gable would practically amount to the demolition of the whole house, by withdrawing from the other parts of the building the security which the gable affords, and altering the distribution of the weights and pressures of the house. It might make the house a complete wreck, and all this for 4½ inches. I most heartily endorse all that your Lordship has said upon that part of the case. I agree that the action should be dismissed.

LORD KINNEAR—I entirely agree upon this ground, that when the owner of house property within a burgh agrees to allow his neighbour to build upon the gable wall, there is a plain implication that the building is to be erected according to the conditions that may be imposed by the Dean of Guild Court. The thing cannot be done otherwise, as both parties must be supposed to have known, and therefore the pursuer if he allows it to be done at all allows it to be done in that way. I think the case does not rest there, because he was asked to allow the gable to be built upon according to the plans which were passing through the Dean of Guild Court, and he therefore knew they would be subject to supervision, and might be altered to satisfy the conditions which the Court might impose. On that ground, I think he has failed entirely to show that there has been any unlawful encroachment on his property. If there had been, I agree further, for the reason your Lordship has given, that the remedy would have been altogether inappropriate, and his claim would have been for compensation for any prejudice he might suffer. I wish to add that I think it must be admitted that some proof was necessary, because the letter which the defender wrote does not bind the pursuer unless he assented to it, and it was necessary to show that there was an agreement upon which the one party consented that the other should act.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer (Respondent)—C. D. Murray—Walter Watson. Agents—M. J. Brown & Son, S.S.C.

Counsel for the Defender (Reclaimer)—The Dean of Faculty (Campbell, K.C.)—Constable. Agents—Wallace & Pennell, S.S.C.