tion either of an Act of Parliament or of a contract, to be one of the most dangerous arguments which can be used in a court of law. Parties make provision for their substantial rights, or Parliament makes provision for the substantial rights of parties. In working out those rights there are certain mechanical or, it may be, administrative courses to be taken. These may in the particular circumstances fail; but it would be a very bad thing if the substantial rights created either by Parliament or by contract were to disappear in consequence of a defect or inapplicability in that subsidiary machinery by which they could be worked out.

That is well known to be the law with regard to Acts of Parliament. It never was more clearly expressed than by Lord Halsbury in the case of *Lysons* v. *Andrew Knowles & Sons, Limited* (1901 A.C. at p. 86), in which he says, construing the Workmen's Compensation Act—"But it is said: if a workman is not employed for at least two weeks how can you average his earnings or his agreed earnings by an 'average' which when you have only got one term is an impossible phrase;" and then he adds this—"Well for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained." The identical principle applies in the present case. Assuming that the parties did contemplate, and that the contract covers, the case of a partial loss, I am not deterred from granting the substantial right to freight contracted for by the fact that difficulties may arise as to how the particular weight of the goods lost is to be ascertained. I agree that the parties have done what any persons in such a position would have done; they have had it ascertained by the ordinary commercial means by men on the spot. It is quite true that certain calculations had to be made on the assumption that the goods lost were on the "average" to be taken as in the same condition as the goods which arrived; that is all that they have done. There is nothing complex, nothing difficult, nothing troublesome about it. I do not wonder that the parties have agreed on the figures, and for my part the fact that the figures had to be so ascertained does, as I say, weigh in no way with me. The right to freight, delivery or no delivery, remains. I do not think that it was ever lost.

Their Lordships reversed the interlocutor appealed from, and remitted to the Court of Session that decree be pronounced for £674, 11s. 11d., with expenses.

Counsel for the Appellant—Condie Sandeman, K.C.—W. G. Normand. Agents—Maclay, Murray, & Spens, Glasgow—Boyd, Jameson, & Young, W.S., Edinburgh—T. Cooper & Company, London.

Counsel for the Respondents—Solicitor-General for Scotland (Murray, K.C.)—W. T. Watson. Agents—Fyfe, Maclean, & Company, Glasgow—Beveridge, Sutherland, & Smith, W.S., Leith—Weightman, Pedders, & Company, Liverpool—Botterell & Roche, London.

Tuesday, June 22.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

WILLIAM BAIRD & COMPANY, LIMITED *v.* M'GRAW.

(In the Court of Session, November 27, 1919, 57 S.L.R. 114.)

Master and Servant—Workmen's Compensation—"Arising out of and in the Course of the Employment"—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1).

A boy, a coal picker, went one day to the pit, not for the purpose of working, but to recover his wages for work previously done. He acted as he had previously done, and while waiting at a place where the workers were accustomed to go, for the man from whom he would get his pay slip, he received injury by accident. *Held* (*sus.* decision of the First Division) that on the facts stated the injury was "arising out of and in the course of the employment."

This case is reported *ante ut supra.*

The employers, William Baird & Company, Limited (appellants in the Court below), appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—Authorities have been cited in support of the appellants' case tending to show that in circumstances presenting analogies to those before your Lordships the tribunals have held that the claim was not in respect of anything which in those particular cases arose out of and in the course of the employment. I should be loth, so far as I am concerned, to make the decision of this case turn upon a meticulous comparison with the circumstances in other cases. I think the purpose of the statute was that we should look at the facts in each case broadly, apply certain principles, and attach great weight, so far as mere facts are concerned, to the view of them taken by the arbitrator, or the County Court Judge, as the case may be, and if there had been an approving judgment of the Court below, be predisposed to take the same view of the facts as that judgment did. But it is not necessary in this case to go into the question, because when we turn to the facts themselves in the appeal they lie in short compass and are fairly plain.

In March 1919 the respondent, a boy called M'Graw, 16 years of age, was a coal picker at the Mossblown Pit of the appellants. The coal-picking tables are tables on to which coals from the pit are dropped as they are

brought to the surface, and as they are carried along the table the coal pickers stand on each side of the table and pick out the stones and the grit. Then the coals are dropped automatically into a shute at the lower end of the table and slide into a railway waggon, and the waggon, which is looked after by another boy called a "trigger," is spragged by means of a piece of wood put on the rails in front of the wheel of the waggon, and when the waggon is full the boy who is called the trigger withdraws the piece of wood, and then the waggon goes on down to the line of the railway company, where its contents are carried away. Beside that line of rails there is another line of rails—in this case the second line of rails was called the Diamond Road—which runs just by the other, and on the Diamond Road on wet and showery days it has been the custom to keep a fire burning, not in the 6-foot way but between the rails, in order to dry the pieces of wood which are used for spragging the waggons. The triggers and the coal pickers used to go round the fire in cold weather and eat their food during the short time they had off for refreshment, and there appears to have been a log which was very convenient for sitting on when doing so. There were sometimes, apparently, waggons on the rails just behind, but those waggons were themselves spragged, and under ordinary circumstances could not move, so that the boys were safe in sitting there.

Now what happened was this—Friday, the 7th of March 1919, was a wet day, and the respondent overslept himself and was late for work and did not intend to go to work, but we have no finding of what would have been the consequence of that. Possibly they were easy going in their views on these things at the pit, as they often are nowadays. Anyhow he had to get his pay for the work which he had already done on previous days, and to that end he appears to have gone to the colliery. The usual practice is to pay at about one o'clock in the afternoon to the pit-head gaffer, who distributes the money, or rather distributes the lines, which they take to the office and on which they get paid; but as the coal pickers—the boys who pick the coals—are numerous, there was a man called Trousdale, who looked after them, to whom it was the custom of the gaffer Shannon to hand over the lines for distribution among the boys. The respondent knew that Shannon distributed the pay lines in this way, and he knew that he would not get his pay line from Trousdale because he had not been at work under him that day, so he did what had been done before on days when boys were not working—he went to the colliery, looked for Shannon himself—not for Trousdale—hoping to get his pay line from him, and then to go to the office and get his pay just as he seems to have done at any rate on one occasion before. On the 7th of March, the day I have referred to, the respondent went into the colliery by the usual way and arrived at the fire which was burning between the rails in the Diamond Road, and there he sat down to warm himself at the fire because it was not yet 1·30 p.m. After sitting about a quarter of an hour or more at the fire, it then being about 1·30 p.m., the respondent went to look for Shannon; he went up the stair to the pithead and to the weigh-box there and asked Riddox, the weighman, if Shannon was there. Riddox said he was not, but that he might be at the saw mill. The respondent then went to the saw mill but did not find Shannon there. These are the facts as found by the Sheriff-Substitute—"The respondent then went back to the fire on the Diamond Road and asked Hamilton, the trigger, if he had seen Shannon. Hamilton answered 'No.' The respondent then asked Hamilton if he had got his pay line. Hamilton replied that he had not. The respondent then told Hamilton that he had slept in and had come to the colliery for his pay and that he was looking for Shannon in order to get his pay line. Hamilton said that he expected Shannon to be round immediately with his (Hamilton's) pay line. The respondent thereupon sat down on the block by the fire to await the coming of Shannon," in accordance with what had succeeded upon the previous occasion to which I have referred. While he was sitting there a waggon, through the carelessness of some workmen, was detached, and came down on the waggon which was behind him on the Diamond Road, knocked it over the wood which had spragged it, and brought it upon the respondent, who was thrown off the log, tumbled over, with the result that one of the wheels went over his leg. The question is whether he is entitled to compensation for that injury. The Sheriff-Substitute found that in law and in fact he was so entitled, and he made a note to the effect that in his view "the pursuer was injured by accident arising out of and in the course of his employment," in that "in order to get his pay he had to go to the colliery, and before getting his pay at the office he had to receive his pay line from Shannon. When looking for Shannon about the pithead at 1·30 p.m. he was acting in the only way he knew of and in the way he and others were accustomed to act. When he was told by Hamilton that Shannon would be round immediately, it was quite reasonable for pursuer to await his coming, and he was entitled to assume that the seat by the fire was a perfectly safe place for him at which to wait."

In the Inner House the First Division took the same view as the Sheriff-Substitute of the law applying to the facts so found, and the question is, were they right? It is said treating the matter as one of principle, that the accident did not arise out of and in the course of the employment—not in the course of the employment, because it is obvious that the boy was not actually working at the time; not out of the employment, because he came there for his own purpose and not for the purpose of his employment. That is the argument. It appears to me that it was a right arising out of the employment of the boy to go and get paid in the usual and proper manner for the work he had done. It was in the course of so

going to get paid that he visited the works upon the Friday. Quite true, he did not go there to work, and probably did not expect to work, but he was still so far as appears one of the workmen of the appellants, and he came there, as was his right, to be paid for work done. In these circumstances I think that what he did was something which arose out of his employment, and if not in the course of his employment to the extent of being a piece of work actually done, it was in the course of his employment in so far as he came there under the terms which subsisted between him and his employer to get paid for the work he had done. That being so, and accepting as we do and must the finding of the Sheriff-Substitute on the facts I find myself in agreement with his view of the law, and further, with the reasons which were given for supporting that view by the learned Judges in the Inner House.

I therefore think that the appeal fails, and I move your Lordships that it be dismissed with costs.

VISCOUNT FINLAY — I am of the same opinion. The accident to this lad happened when he had gone to the works for the purpose of getting payment of the wages due to him. Payment of the wages is, of course, a thing in which both the workman and the employer are interested. The workman must get his wages for his own benefit and for his maintenance. On the other hand, the employer being under a liability to pay, it is a great convenience to him that the men should come in the established way for the purpose of getting their pay so that the liability of the employer to them may be cleared up at once and in the manner which is common.

In this case the payment was made habitually on a Friday. It was made in respect of the work that had been done during the week previous—that is to say, the week up to and including the Thursday, the day before the Friday. Payment was made in the manner which is described in the appellants' case in a short passage — "Pay is made to the surface workers at the colliery in the following manner: — Pay lines are made out at the office and given in the office about 1 p.m. to the pithead gaffer, J. Shannon. The night-shift workers assemble at the office door from 1 to 1·15 p.m., and to them Shannon hands their pay lines. He then goes round the pithead and distributes the pay lines to the employees at work. He gives the pay lines for the coal pickers to Robert Trousdale, the man who looks after the boys"—the lad injured in this case was one of the coal pickers—"if any coal picker is not at work Trousdale hands back that boy's pay line to Shannon. The pay lines are cashed at the office by the employees after they get them." On the morning of the Friday, M'Graw, the lad whose injury forms the subject of this claim, would have gone to work in the ordinary way, and got payment in the course of the day in the manner described in the passage I have just read, but he overslept himself in the morning and did not go to work on that day, but in the middle of the day, just after one o'clock, he went there for the purpose, and as I take it on the statement of facts for the sole purpose, of getting his wages, and not for the purpose of doing any work at all. But I think that to go to get his wages was in the course of his employment. The getting of the wages on the Friday if he had been at work on that day—wages for the work which had ended on Thursday—would have been no part of the actual work which he was doing on the Friday. It is an incident of the work, and the Act extends to the ordinary incidents of work as well as to the actual doing of the work itself. He had gone to get his wages, and in so going I think he was in the course of his employment. He had to find Shannon in order to get his pay lines, and while he was waiting for Shannon he sat down near a fire in a manner which was not unusual among the men, and while there the accident occurred in the manner which has been described in the evidence.

It appears to me that in this case the conclusion in point of law arrived at by the arbitrator in the first instance, and afterwards by the Court, was perfectly right. The boy was there on business which was part of his employment, for discharging the liability for wages is a thing that must be attended to, and he did it in the ordinary way after he had overslept himself so that he was no longer at work on that day. I assume in favour of the appellants that he was there solely for the purpose of getting his wages, but I think that was in the course of his employment, and that this injury arose not only in the course of his employment but out of his employment.

VISCOUNT CAVE—This case may appear to be somewhat near the line, but upon the whole I have come to the conclusion that there was evidence, the effect of which has been stated by the noble and learned Lord on the Woolsack, on which the Sheriff-Substitute could find that the accident arose out of and in the course of the employment. In effect the finding is this, that the accident arose out of the employment because it was incidental to the employment that the workman should go and get his pay, and that it arose in the course of the employment because the workman, who had not been discharged, was engaged in getting his pay on the day and at the hour fixed for payment, and in the only way known to him in which he could get payment. I cannot say that the finding based upon these facts is wrong in law, and therefore I do not think that it ought to be disturbed.

LORD DUNEDIN — I concur. The case depends on the answer given to the question — Was the boy when the accident occurred doing something incidental to his employment? I think it was incidental to his employment to get his wages, for which purpose he had to get a document called a pay line. He proceeded to get this pay line in a proper way. That was found as a fact by the learned arbitrator, and I think there was evidence on which he could so find. That ends the case.

LORD SHAW—I concur with Lord Dunedin.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants—Lord Advocate (Morison, K.C.) — Fenton. Agents — James M. Inglis, Kilmarnock—Simpson & Marwick, W.S., Edinburgh — Deacon & Company, London.

Counsel for the Respondent—Moncrieff, K.C.—Patrick—R. C. Henderson. Agents —M'Millan & Howie, Ayr—Macpherson & Mackay, W.S., Edinburgh—John Kennedy, Westminster.

HIGH COURT OF JUSTICIARY.

Wednesday, May 5.

CIRCUIT COURT AT GLASGOW.

H. M. ADVOCATE *v.* FRASER AND ROLLINS.

Justiciary Cases—Crimes—Murder—Intention—Mens Rea.

"If a person attempts a crime of serious violence, although his object may not be murder, and if the result of that violence is death, then the jury are bound to convict of murder." Illustrations—criminal abortion, rape, and robbery.

At a Circuit Court held in Glasgow, May 3-5, Fraser and Rollins were charged at the instance of H. M. Advocate with the crime of murder.

The *facts* were not seriously questioned as they were established by the evidence and are given (*infra*) in the charge of the presiding Judge, but the question of what was required to constitute "murder" as distinguished from "culpable homicide" was argued. In charging the jury the presiding Judge spoke as follows—

LORD SANDS—Now I come to the fourth and by far the most serious charge, the charge of assaulting and robbing and murdering Henry Senior. I have never known a case where after so much evidence so little was really in dispute as regards the outlines of the story. The learned counsel for the defence have said everything that could be said on their clients' behalf, but they have most judiciously refrained from putting their case too high and have not attempted to argue that the two men in the dock are not responsible for the death of Henry Senior, and that makes it unnecessary for me to go elaborately into the evidence which traces these men to the spot and connects them with the crime. Henry Senior, as the learned Advocate-Depute pointed out, left his house on 3rd February about seven o'clock in the evening in perfect health. Some three hours afterwards Henry Senior was lying dead in Queen's Park. There is no doubt whatever that Henry Senior was killed by the two men in the dock. I do not think you will have any difficulty in that matter. Counsel for the prisoners conceded it, and therefore I do not think I need elaborate the incidents of the evidence which point inevitably to that conclusion. But the question you have to determine—and it is really as counsel conceded the only question in the case—is, seeing that these two men, the prisoners at the bar, killed Henry Senior, did they murder him? That is the question. Now the outlines of the story are very simple. These men and the two women whom you saw as witnesses were leading a deplorable and degrading life, but you are not to be prejudiced against them as regards the evidence in this case by your repulsion against that form of life and the dependence of the men upon female prostitution, but I thought it right to bring out the facts in regard to that matter because it has an undoubted bearing upon the question you have to try and the view you must take of the evidence of the motives of these men. Upon the night in question the girl White was requested by the two accused to pick up a man and to take him to some place of seclusion, the intention being that the two men should follow her and her victim and when they came to a place of seclusion that there they should rob him by violence. The place contemplated as being most convenient for the purpose without going a great distance appears to have been Glasgow Green, but it seems that the man Senior suggested another and more remote place, namely, the Queen's Park. That is the girl's story, and in any event the girl and Senior went to the Queen's Park. They went by tramway but the two accused did not lose sight of them. They boarded the tram-car and when the girl and Senior had taken up a position in the park the two were lurking near at hand. Well, there followed upon that the attack by the two accused upon Senior. We only get part of the story. It is the story of an informer, no doubt, but I think you were all impressed by the fact that this girl White, whatever her sins, was not trying to make it worse than was necessary against her paramour or the other man. There seems to be no reason for doubting or disbelieving her story of what she saw. She saw the attack made upon Senior, and that attack took the form of some threatening with a revolver which is said to have been a dummy, or at all events an unloaded one, in front, followed by a seizure of the man from behind round the throat by Rollins and an attack first with fists and then with this revolver upon the man's face by Fraser. That is as far as the girl takes the story. It seems that she thought the violence was too great and shouted out something to the men, but no attention was paid to that and she took fright and left the place. After that we have no evidence of eyewitnesses of what took place. We know nothing except that these two men, the accused, turned up shortly afterwards in the centre of Glasgow and reported to the girl White and the girl Stewart that they had had so far a successful robbery, that they "had done a man in," and were doubt-