which is left open by the judgment of the House of Lords in *Mackenzie*. Now the only other question from which I think comes any real trouble is the question whether in calculating the four years the wife was entitled to a deduction for the period during which an action of separation was running. Under the circumstances here I am of opinion that she was not. There is little or no authority on the matter in the books in this country, but the question does seem to have arisen in America, and although it is no authority that binds one, I think that one is fortified in one's view by the view which seems to have been taken there, and which I find in section 1758 of the last edition of Mr Bishop's book. After dealing with proceedings which are really a fraud on the Court, he goes on—"Or if after a desertion has commenced, there comes a real divorce suit, rendering a renewal of the cohabitation temporarily improper, still it does not intercept the desertion; because, as an intent to continue the cohabitation will in the absence of explanation extend through the temporary separation of the last section (*i.e., while carrying on any form of divorce suit*), so the intent to desert will reach forward and govern the period of the divorce suit here stated." Now taking the facts of this case I think it is perfectly clear that although one would hesitate to say that when the lady originally went away from her husband's house she did it with a mind then actually made up to desert, I think that that state of mind very rapidly supervened under the influence of her own relations. I think it was brought to an absolute point in the beginning of the next year, when after a demand had been made by her for a separation the whole matter had been carefully looked into by the husband's lawyer, and a perfectly clear and proper letter had been written by that gentleman, saying that he, having gone into the whole facts, had found nothing which would justify such a demand, and that it must be distinctly understood that the husband wished his wife to come back again. Well, after that period it seems to me the intention to desert is clear, and I think that if there was to be any action raised, it ought to have been raised then and there, at once. It seems to me impossible that after a long period after this is allowed to elapse, and after at one time the wife seems almost to have been in a state of mind in which she was going to come back, she could then break off on this absurd pretext about the nurse, then, raising an action of separation in which she is entirely unsuccessful, claim to have the period deducted. All these remarks seem to be enormously strengthened when I remember the fact that up to this hour there has never been an offer by this lady to come back. It would be a perfectly different question if what your Lordships were deciding was a case in which a wife was at your Lordships' bar saying, "I am willing to live with my husband to-morrow; don't settle it that the axe has fallen, that the last hour of the four years is run out and that I am divorced"; whereas here you have persistent desertion maintained to this very hour. I am entirely of the opinion of the Lord Ordinary, and think his judgment should be adhered to.

LORD M'LAREN—I concur with his Lordship in the chair, both as to the facts and as to the legal principles raised in the case.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—Cooper, K.C.—Macphail. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for Defender (Reclaimer)—Scott Dickson, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Saturday, July 18.

FIRST DIVISION

[Sheriff Court at Glasgow.

O'BRIEN AND ANOTHER *v.* THE STAR LINE, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident—"Arising Out of and in the Course of the Employment"—Onus—Fireman Found Injured in Part of Ship Accessible only through Door which had been Locked and where no Business to be.*

In order to recover compensation under the Workmen's Compensation Act 1906 a claimant must prove that the accident arose "out of" and "in the course of" the workman's employment; and the *onus* is not discharged if the manner in which the accident happened is left unexplained and the evidence is consistent with its having arisen otherwise than out of and in the course of the employment.

A fireman whose duty it was to remain on board a steamship went ashore without leave and returned late at night intoxicated. Next morning he was found fatally injured in a part of the ship where he had no right to be, and to reach which he had to get beyond an iron door which had been locked. There was no evidence as to how he got there, or as to how the locked door was forced, or as to how the accident happened.

Held that there being no proof that the accident had arisen out of and in the course of the deceased's employment, his dependants were not entitled to compensation.

Mrs Mary Burge or O'Brien, widow of Stephen O'Brien, fireman, and Daisy Burge, his stepdaughter, claimed compensation

under the Workmen's Compensation Act 1906 from the Star Line, Limited, Fenchurch Avenue, London, in respect of the death of the said Stephen O'Brien.

The matter was referred to the arbitration of the Sheriff-Substitute at Glasgow (FYFE), who refused the application.

A case for appeal was stated.

The *facts* as stated by the Sheriff-Substitute were—"(1) That Stephen O'Brien was a fireman on board respondents' steamship 'Star of Ireland,' which ship he joined at Barry on 16th August 1907, and it was his duty to remain on board said steamship and subject himself at any time to the orders of the master and chief engineer of the said steamship. (2) That his wages from 16th August 1907 were £4, 10s, per month, and the value of his board and lodging was 1s. 6d. per day, together these were of the value of £81, 6s. per annum. That for the immediately preceding voyage of four months he had served as fireman on board said vessel at wages of £3, 15s. per month with similar board and lodging. (3) That in August 1907 said vessel was in Glasgow harbour. (4) That on Monday evening, 19th August, O'Brien went ashore without permission. (5) That he returned the worse of drink late in the evening. (6) That he went to his bunk in the fireman's forecastle. (7) That about 5·30 on the morning of Tuesday, 20th August, he was found seriously injured lying at the bottom of No. 1 hold. (8) That the hatch of No. 1 hold was open during the night. (9) That this hatch is situated inside the fore-extension of the vessel, which is an enclosed and covered portion of the vessel on the main deck used for stowing cargo in, and the entrance to which is by a hatch on the upper deck which was battened down on the night in question. There is an iron door communicating between the fore-extension and the forecastle, and the hatch through which deceased fell is situated about 2 feet from the said door, and 1 foot to the left of the line of said door. (10) That this door had been locked and bolted at Barry as is usual by the first officer preparatory to cargo being stowed there at Glasgow, but that it had been forced or broken open at some time and by some person or persons unknown. (11) That this door is at right angles to and distant a few feet from the door of the firemen's lavatory, and is on the same deck and directly opposite to the door of the firemen's forecastle, which is 11 feet 10 inches away. (12) That the doors of the fore-extension and of the lavatory are vastly different in construction, size, material, and position. (13) That the door of the lavatory was always open, and kept so by lashings. (14) That from the time of his return to the ship until he was found in the hold the deceased had no duties to perform in the service of the ship, and in particular had no duty which took him into the fore-extension, and had no right to be in that portion of the ship. (15) That the deceased Stephen O'Brien was taken to the Western Infirmary, Glasgow. (16) That on 23rd August 1907 he died there in consequence of his injuries. (17) That apart from these findings there was no evidence led accounting for the deceased being found injured lying at the bottom of No. 1 hold."

The Sheriff-Substitute further stated—"On the facts proved as above I found that there was no evidence that the death of the deceased Stephen O'Brien was the result of injury sustained by accident arising out of and in the course of his employment. I therefore refused appellants' application and found respondents entitled to expenses."

The *question of law* was—"Whether on the facts found proved Stephen O'Brien's death was the result of injury sustained by accident, and if so, whether such accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for appellants—There was no question here as to misconduct, for in cases of fatal accident the defence of serious and wilful misconduct was no longer available—Workmen's Compensation Act 1906, sec. 1 (2) (c). It was the duty of the deceased to be on board, and therefore the accident clearly arose "in the course of" his employment. The only question was as to whether it had arisen "out of" his employment. The Act was not limited to accidents sustained by workmen while actively employed, *e.g.*, a workman going for a drink would still be in the course of his employment—*Keenan* v. *Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144; *Mackenzie* v. *Coltness Iron Company, Limited*, October 21, 1903, 6 F. 8, 41 S.L.R. 6; *Blovelt* v. *Sawyer*, [1904] 1 K.B. 271. The present case was *a fortiori* of *Blovelt*, for it was a term of O'Brien's contract that he should remain on board. The accident was one which was incidental to his employment, and must therefore be presumed, in the absence of contrary evidence, to have arisen "out of" his employment—*Johnston* v. *Marshall, Sons & Company, Limited*, [1906] A.C. 409; *Robertson* v. *Allan Brothers & Company*, 1908, 124 L.T. 548. The case of *Pomfret* (*cit. infra*), on which the respondents relied, was inconsistent with the cases of *Johnston* (*cit. supra*), and *Macdonald* v. *Refuge Assurance Company, Limited*, June 17, 1890, 17 R. 955, 27 S.L.R. 764. The cases of *Wakelin* (*cit. infra*), and *Barrie* (*cit. infra*), founded on by the respondents, were inapplicable, for they depended on negligence, and no question of negligence arose here.

Argued for respondents—This was a question of fact on which the arbiter was final. It lay on the appellants to prove that the accident happened "out of" as well as "in the course of" the deceased's employment, and they had failed to do so. The *onus* was not discharged if the cause of the accident was left unexplained—*Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 718; *Wakelin* v. *London and South-Western Railway Company*, 1886, L.R., 12 A.C. 41; *Barrie* v. *Police Commis-*

sioners of Kilsyth, December 1, 1898, 1 F. 194, 36 S.L.R. 149. Such evidence as there was had failed to convince the Judge who tried the case that the accident arose out of the deceased's employment, and the appellants had failed to show that his decision was wrong.

At advising—

LORD M'LAREN—This is an appeal from the decision of the Sheriff-Substitute of Lanarkshire as arbitrator under the Workmen's Compensation Act 1906 in a claim arising out of the death of Stephen O'Brien. The arbitrator has found that there is no evidence that the death of O'Brien was the result of injury sustained by accident arising out of and in the course of his employment. The material facts as stated in the case are as follows—[*After summarising the facts given above his Lordship proceeded*)—Now, in a certain sense this may be described as an accident arising in the course of the employment, because O'Brien was bound by the terms of his employment to be on board ship at night, and if he had not been in the employment of the Star Line the accident could not have happened. But this consideration does not solve the question, because the employer is only liable to make compensation for an accident arising "out of" the employment, which I take to mean that there must be some causal relation between the employment and the accident. On the facts stated, the accident is wholly unexplained. The difficulty of assigning a cause is increased by the finding of the Sheriff that O'Brien when he returned to the ship was the worse of drink. There is no question as to misconduct in the case, because that element is excluded by the Statute of 1906 in the case of accidents resulting in death. But it was the misfortune of O'Brien that when he returned to the ship he was under the influence of drink, whether from his own serious fault or from some excusable cause is of no consequence in the present inquiry, and people in that condition sometimes do strange things, which in a legal sense may be regarded as their voluntary acts. It was suggested for the claimants that O'Brien, having occasion to go to the lavatory, missed his way and fell into the hold. If the iron door communicating with the hold had been left open, this might be a probable explanation. But then it is found by the Sheriff that this door was locked and bolted by the mate or first officer of the ship, and there is no evidence that it was afterwards opened by some person other than O'Brien. The facts are then consistent with the supposition that the door in question was forced open by O'Brien himself, in which case it could not be affirmed that the accident had arisen out of the contract of employment. We do not know how the door was opened, or how O'Brien fell into the hold. As to the cause of the accident the evidence is a complete blank, and therefore I am unable to say that it was in fact an accident arising out of and in the course of the employment.

The conditions of the question are nearly the same as we find in the English case of *Lancashire and Yorkshire Railway Company* v. *Pomfret*. The workman, who was in the employment of the railway company, was travelling homewards, as he was entitled to do, in one of the company's carriages. He was found with his head crushed under a bridge and on the line, and there was no evidence as to how the man lost his life. The Court of Appeal was of opinion that in the absence of evidence on this point it could not be affirmed that the accident arose out of the employment, because it was possible that it might be the result of the voluntary act of the deceased in attempting to leave the carriage while the train was in motion. Lord Justice Stirling's illustration makes the ground of judgment very clear. Now I am not overlooking the subsequent history of the case, which is, that the Court remitted to the arbitrator to take further evidence, and on a re-hearing held that the party was entitled to compensation. That was only a decision on the facts of the particular case. In the present case I do not propose that we should direct a further inquiry by the Sheriff, because I am satisfied on his statement of the case that we are in possession of all the evidence of which the case admits. But then the case is just in the position in which the case of *Pomfret* stood at the first hearing, and the opinions delivered at that hearing support the conclusion to which I have come, that it is not proved that this accident arose from a cause for which the respondents are responsible. I am therefore of opinion that the appeal should be dismissed.

LORD KINNEAR—The question as stated by the learned Sheriff is really a question of fact. I have no doubt that if the Sheriff arrives at a conclusion such as he states in the last sentence of his statement when he says, "I found there was no evidence that the death of the deceased Stephen O'Brien was the result of injuries sustained by accident in the course of his employment," and if he arrives at that conclusion upon the ground that there is no legal evidence which he is entitled to consider, the Court may review a decision of that kind. We may instruct him, as we might instruct a jury, that there is evidence from which they might draw an inference of fact. We cannot tell the judge or the jury that there is evidence from which they ought to draw an inference of fact, but if it appeared to me on reading this case that the Sheriff had gone wrong by misdirecting himself as to the kind of evidence which he ought to consider, I should have thought that a proper question was raised for the decision of the Court. But it seems to me quite clear that the Sheriff's decision is really a decision on fact upon evidence which he has fully considered, and I am not prepared to interfere with his judgment on a mere question of fact. I must say, however, since we have heard the whole question argued, I quite agree with the conclusion at which the learned Sheriff

arrived. It must be taken, I think, as settled, that in order to recover compensation under the Workmen's Compensation Act the claimant must establish two things—first, that the accident arose in the course of the workman's employment; and secondly, that it arose out of the workman's employment; and that the *onus* of proving those facts lies upon the claimant. Now all we know is that this man was sleeping on board the steamship on which he was fireman. In the course of his employment it was his duty to be on board at night in order to submit himself to the orders of the master and chief engineer, and so far, therefore, he was in the performance of his duty in being on board. But then it was found that "from the time of his return to the ship the deceased had no duties to perform in the service of the ship, and, in particular, he had no duty which took him into the fore-extension, and had no right to be in that portion of the ship." It rather seems to me that that finding, taken by itself, negatives the proposition which the appellant seeks to make out, namely, that the accident happened out of his employment. He had no duty to perform at all, but was entitled to be on board and bound to be on board in order that he might be available for any duty that he might be called upon to perform. Now it may be that if it had been shown that in these circumstances an accident had befallen him from mere blundering through one door instead of going through another in going to a part of the ship where he was entitled to be, a question might have arisen, but that is not the fact. The fact is that he was found lying in the hold, that he could not have got there without in the first place going into a part of the ship where he had no right to be, and in the second place he could not go into that part of the ship without opening a locked door. The door was forced or broken open at some time by some person; the Sheriff says it is not ascertained how or by whom. But then all the facts are that this man was found to have been injured by going into a part of the ship where he had no right to be, and which he could not have reached without forcing a locked door. I am unable to see how that can be said to be an accident arising out of his employment. I am not disposed to speculate as to how the accident might have happened, or how the door might have come to be open, because it is for the claimant to prove how that happened, if he can show that it happened in such a way as to bring the case within the scope of the Act, and he has failed to prove it. It is possible to imagine a variety of ways by which such a thing might occur, but there is no reason to suppose that it occurred in the performance of duty. I agree with what was said by your Lordship in the chair that we must take into account that the Sheriff finds this man came aboard in a state of intoxication. How did an intoxicated man open or break through a locked door and tumble into a hold where he ought not to be? I agree with the Sheriff that upon the evidence we cannot say we know anything about that. It is not proved that he did these things in the course of employment in which he was engaged.

LORD MACKENZIE concurred.

The LORD PRESIDENT and LORD PEARSON were absent.

The Court answered the question of law in the negative, and dismissed the appeal.

Counsel for Appellants—Wilton. Agent—Alexander Bowie, S.S.C.

Counsel for Respondents—Spens. Agent—Campbell Faill, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Sheriff Court at Paisley.

CARTER *v.* JOHN LANG & SONS.

Master and Servant — Compensation — Average Weekly Earnings— Basis of Calculation— Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, sec,* 1 (*b*); *sec.* 2 (*a*) *and* (*c*).

The question whether the period during which a workman has been employed is sufficiently long to enable his "average weekly earnings" to be calculated for the purposes of the Workmen's Compensation Act 1906 is a question of fact depending on the nature of the employment, and proper for the arbiter to decide. Where the arbiter is of opinion that it is so, it remains for him to take the number of complete working weeks such as are customary in the trade or employment during which the workman has been employed, and divide therewith the amount of wages earned during such weeks, and if owing, for example, to trade holidays it would be impossible for a workman to have employment in such trade for fifty-two weeks in the year, to deduct from the average wage thus obtained a percentage corresponding to the percentage of weeks employment could not be obtained.

A workman having been incapacitated was entitled to compensation under the Workmen's Compensation Act 1906. At the date of the accident thirteen weeks had expired since he had entered the employment, but of that period for one week he had earned nothing, and for a second very little, owing to illness, and again for one week he had earned nothing, and for a second very little, owing to the annual trade holidays. The arbiter found that the period during which there had been employment was not too short to enable him to compute the "average weekly earnings" of the workman, and that the proper mode for so doing was to divide the total amount of wages by thirteen. *Held*, on a stated case, that