pecuniary or specific legacies, seventeen of which are of amounts or values exceeding £10), numbered 23 of process, and having heard counsel on the question as to whether fee fund dues for 2s. 6d. are of the proper denomination payable on said condescendence and claim, and having consulted with the other Judges of the Outer House in regard to same, Finds that the said sum of 2s. 6d. is the proper amount of fee fund dues payable in respect of said condescendence and claim."

Counsel for the Real Raisers—Wilton. Agents—Lindsay, Howe, & Co., W.S.

Counsel for Claimants—Wilson, K.C.—Graham Robertson. Agents — Burns & Waugh, W.S.

Saturday, December 4.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WHITE *v.* W. & T. AVERY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—"*Arising Out of the Employment*"—*Machine-Fitter Injured by Falling while Walking for the Purposes of His Business on a Road in a Slippery Condition.*

A machine-fitter, whose duty it was to go round to various places where his employers had erected or executed repairs upon weighing-machines, was engaged in inspecting railway weighing-machines. To one of the machines he proceeded to walk upon a road rendered slippery by frost after rain. While endeavouring to avoid a vehicle he slipped and fell, breaking his wrist. *Held* (*diss.* Lord Mackenzie) that the injury was caused by accident arising out of as well as in the course of the employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation in accordance with the First Schedule to this Act."

William Beverege White, 4 India Street, Partick, Glasgow, *appellant*, having in the Sheriff Court at Glasgow claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from W. & T. Avery, Limited, 179-185 Dumbarton Road, Partick, Glasgow, *respondents*, the Sheriff-Substitute (FYFE), acting as arbitrator, refused to award compensation, and at his request stated a Case for appeal.

The Case stated—". . . The following *facts* were established:—(1) That appellant is a machine fitter, and for about fifteen months prior to 23rd December 1914 had been in respondents' employment. (2) That he was paid by the hour, and his average weekly earnings were 38s. 7d. (3) That it was his duty to go round to various places where respondents had erected or executed repairs upon weighing-machines, to be present as representing respondents at the inspection by the County Inspector of Weights and Measures of such machines. (4) That in pursuance of this duty the appellant on 23rd December 1914 went to meet the County Inspector for the inspection of railway machines at various places in the Clackmannan district. (5) That they first visited Forrestmill, where they completed their work early in the forenoon. (6) That the next place appellant required to be present at an inspection was Kennet, a village about half-an-hour's walk from Forrestmill. (7) That the County Inspector had a bicycle, upon which he went from place to place, and appellant had a railway pass, but as there was no convenient railway communication, the appellant, in order to keep in touch with the County Inspector and economise his employers' time, decided to walk the short distance to Kennet. (8) That there had been frost after recent rain, and the road was slippery, and appellant considered the centre of the road the safest place to walk; but otherwise there were no other exceptional weather conditions affecting pedestrians. (9) That just as he was entering the village a butcher's van came up behind him. (10) That to let it pass appellant stepped to the side of the road. (11) That he slipped on the ice and fell. (12) That he sustained injury by breaking his wrist. (13) That he was thereby disabled from continuing his proposed round of inspection and returned to Glasgow. (14) That he was incapacitated for work for a considerable time.

"I *found in law* that the accident whereby the appellant sustained personal injury which incapacitated him for work arose in the course of, but did not arise out of, his employment within the meaning of the Workmen's Compensation Act 1906, and that he was not entitled to compensation. I therefore refused to award compensation as craved, and found respondents entitled to expenses."

The *question of law* for the opinion of the Court was—"Whether the accident to the appellant arose out of his employment?"

The arbitrator added this *note*:—"In this case there is no doubt that an accident occurred whilst the pursuer was in defenders' pay, for he was paid for the time he was travelling from place to place, as well as for the time he was doing mechanical or inspection work for the defenders. It accordingly arose in the course of his employment. The only controvery is, whether it also arose out of the employment. It cannot be suggested that the pursuer was doing anything he ought not to have done. On the contrary, he was, at personal inconvenience, endeavouring to save time. He had a pass on the railway, and might have gone back to Alloa to get a train, and gone to Kennet comfortably by rail, instead of walking on the slippery road. But if he had done that he would have lost touch with the County Inspector, who was on a bicycle, and he had come out from Glasgow expressly to go round the places with the inspector.

There is accordingly in this case no element of careless execution of his work by a workman—still less any element of wilful misconduct. But whilst not in any way reflecting on pursuer's conduct, the defenders take the objection that the accident did not arise out of the employment within the meaning of the Workmen's Compensation Act, and as I think they are right in law I am constrained to sustain defenders' contention. The authorities upon this—as upon everything else concerning the Workmen's Compensation Act — are of course conflicting, but I think a recent case very analogous to the present, rules it. I refer to the case of *Kinghorn* v. *Guthrie*, 1913 S.C. 1155, 50 S.L.R. 863. The opinion of Lord Salvesen especially expresses the law which seems applicable to the present case. The risk which the pursuer ran in walking upon a slippery road was not a risk to which he was exposed because of the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed."

Argued for the appellant—The accident was due to the nature of the appellant's employment, which involved travelling from place to place. The risks of travel by road, rail, &c., were therefore risks of his employment, and the accident arose out of one of them. In any event the travelling the appellant had to do was so frequent as to make the risks of travelling special risks of his employment—*Craske* v. *Wigan*, [1909] 2 K.B. 635, approved in *Plumb* v. *Cobden Flour Mills Company*, [1914] A.C. 62, 51 S.L.R. 861; *Hughes* v. *Bett*, 1915 S.C. 150, 52 S.L.R. 93; *Kitchenham* v. *Owners of s.s. Johannesburg*, [1911] A.C. 417, 49 S.L.R. 626; *Kinghorn* v. *Guthrie*, 1913 S.C. 1155, 50 S.L.R. 863; *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15; *Pierce* v. *Clothing and Supply Company, Limited*, [1911] 1 K.B. 997; *Andrew* v. *Failsworth Industrial Society, Limited*, 1904, 2 K.B. 32; *Adamson* v. *Anderson & Company, Limited*, 1913 S.C. 1038, 50 S.L.R. 855; *Millar* v. *Refuge Assurance Company*, 1912 S.C. 37, 49 S.L.R. 67; *Kelly* v. *Kerry County Council*, 1908, 42 Ir. L.T. 23, 1 B.W.C.C. 194.

Argued for the respondents—The question of "arising out of" was one of fact for the arbitrator, who had found that the risk was an ordinary risk to which every pedestrian was exposed. Such a risk might become a risk of the employment if the employment was of such a nature as to expose the workman to such a risk in more than the average degree. The same would follow if the employment entailed more frequent exposure to such a risk than the average. The findings of the arbitrator excluded these possibilities—*Warner* v. *Couchman*, 1912 A.C. 35; *Kitchenham v. Owners of S.S. "Johannesburg"* (*cit.*); *Plumb* v. *Cobden Flour Mills Company, Limited* (*cit.*); *Sheldon* v. *Needham*, 1914, 30 T.L.R. 590; *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; *Rodger* v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413; *Kinghorn* v. *Guthrie* (*cit.*); *Hughes* v. *Bett* (*cit.*); *M'Neice* v. *Singer Sewing Machine Company, Limited* (*cit.*); *Wicks* v. *Dowell & Company*, [1905] 2 K.B. 225; *Cooper* v. *North-Eastern Railway Company*, 1915, 32 T.L.R. 131; *Sinclair* v. *Simpson*, 1915, 53 S.L.T. 94.

At advising—

LORD SKERRINGTON—The question put to us by the learned arbitrator is "Whether the accident to the appellant arose out of his employment?" A preferable form for the question is "Whether the arbitrator was entitled to hold that the accident to the appellant did not arise out of his employment?" I have come to the conclusion that this question must be answered in the negative, because the facts which the arbitrator has found to be proved stamp the accident as one which arose not merely in the course of, but also out of, the appellant's employment. The appellant was a machine-fitter, and it was his duty to go round to various places in order to be present as representing the respondents when the county inspector of weights and measures inspected certain weighing machines. After finishing his inspection at Forrestmill on the day of the accident the inspector had to inspect a weighing machine at Kennet, a village about half an hour's walk from Forrestmill. He went there by bicycle, but as there was no convenient railway communication the appellant, in order to keep in touch with the inspector, decided to walk the short distance to Kennet. The road was slippery owing to frost after recent rain, and the appellant, whilst stepping aside in order to avoid a butcher's van, slipped on the ice and fell and broke his wrist. It was not disputed by the respondents' counsel that in walking by that particular road from Forrestmill to Kennet the appellant acted in accordance with his duty to his employers. In these circumstances it would not, I think, occur to anyone except a lawyer that there was any doubt that the accident by which the appellant was injured arose out of his employment. On the contrary, the circumstances seem to present a typical case of an accident which was directly attributable to the employment. The appellant's employment required him to walk along a certain road and so to expose himself to injury from something dangerous which was to be found on that road. The respondents' counsel argued that other people who were not in the employment, but who were walking along the same road on their own business, would have been equally exposed to the same or a similar accident. That is quite true, but, as it seems to me, it is also quite irrelevant.

In a note to his interlocutor the arbitrator explained that he refused compensation because he was constrained to do so by the decision in a case which he described as "very analogous to the present." For my own part I see no such analogy. In *Guthrie* v. *Kinghorn*, 1913 S.C. 1155, 50 S.L.R. 863, the case referred to by the arbitrator, a carter who was working in his employers' yard was injured by a piece of iron which was blown by a gale of wind from adjoining premises and fell upon his head. The Court took the view that the claimant had failed

to show any special connection except that they were simultaneous in time between the accident and the employment. The judgment would, no doubt, have been different if the yard, like the road in the present case, had been in such a condition as specially to expose the workmen to the risk of the injury which befell him. It is of course elementary in this branch of the law that the statute specifies two distinct conditions both of which must be fulfilled before compensation can be successfully claimed, viz., that the injury by accident must arise both out of and also in the course of the employment. Accordingly it is not enough to prove that a workman while doing his master's work was injured either by a gale of wind, or by lightning, or by a fit of apoplexy, or by being assaulted. So to hold would be equivalent to writing out the requirement that the injury by accident must arise out of the employment. *Prima facie* employment of an ordinary character does not specially expose a workman to injury from any one of the four causes which I have enumerated, though it is always open to a workman to prove the contrary as regards his particular employment if he is able to do so. On the other hand, it is undeniable that a workman who is required to walk along a certain road is specially exposed to all the perils consequent on the condition or traffic of that road.

If legal authority is required in support of the appellant's claim, his case is covered by the decision of this Division of the Court in *Hughes* v. *Bett*, 1915 S.C. 150, 52 S.L.R. 93. I am unable to discover any material distinction between that case and the present one. Further, the previous authorities were reviewed, and the arguments adduced by the respondents' counsel in the present case were considered in the opinion of the Lord President, with which I respectfully concur. There is only one other Scottish authority to which I need refer, and that is the case of *Millar* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, 49 S.L.R. 67. This case, though very much in point, was not cited in that of *Hughes*. The claimant was a collector, and stated that he had fallen upon a certain stair which he had occasion to use while seeking to collect a premium. There was no direct evidence except his own that he had fallen upon that stair, and the Judges came with difficulty to the conclusion that the arbitrator was entitled to hold this fact to be proved. After deciding this point, however, in favour of the claimant, they went on to hold that the accident was one which arose out of the employment, or at anyrate that the arbitrator was entitled so to find. Lord Dunedin said—"I arrive at the conclusion that if this man was on this stair simply and solely for the purpose of his business, namely, to go to the person whom he was calling upon, this accident fairly arose out of his employment as well as in the course of it." Lord Kinnear said—"It is said that this tripping upon a stair is a thing that might happen to anybody who goes up and down a stair, and therefore is a risk which is not specially connected with the particular work of the respondent. I think there is force in that, but then, on the other hand, I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time." While I respectfully agree with the decision in *Millar's* case, I think that it was a narrower one than that now before us, because the claimant did not attribute his fall to anything special in the condition of the stair. For all that appeared he might have tripped himself up by inadvertently putting one foot before the other, an accident which may happen to any person at any time and at any place. But it is usually more dangerous to fall on a stair which forms the access to a house than in one's own home, and accordingly the arbitrator was held entitled to find that the injury arose out of the employment. If in the present case the appellant had fallen, not in consequence of the condition of the road, but simply because he tripped himself up, it may be, though I express no opinion on the point, that the arbitrator would have been entitled (if he thought fit) to negative any special connection between the injury and the employment. But in view of the actual cause of the accident I am of opinion that he was not entitled to take this course. The respondents' counsel founded upon certain dicta of Lord Dunedin in *Millar's* case for the suggestion that a person in the position of the present appellant can have no claim to compensation unless it can be said of him that, like a sandwichman, "his actual business is to wander up and down the streets all day." It seems to me that Lord Dunedin's reference to the sandwichman was made simply in order to give an illustration of a person "whose business actually takes him to the street," and that he did not intend to lay it down that there can be no claim for compensation unless the injury arose from some peril to which the workman was exposed every day and all day, or (what is much the same thing) some peril which arose out of his employment, regarded not in the concrete but generally and in the abstract. Obviously the employment of a machine-fitter (regarded in the abstract) does not involve as a necessary and universal consequence that he must as a matter of duty to his employers walk along a public road either constantly like a sandwichman or even occasionally. Of course he has to walk from his home to his workshop and back again, but that is regarded as his own business and not that of his employer. In my opinion, however, it is enough to entitle a workman to compensation if he can say that on the occasion when he was injured by a peril of the street his duty to his employer took him to that street, though the occasion may have been of a rare and exceptional character. Reference was also made to the opinion of the same Judge in the cases of *Rodger* v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413, and *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254, for the suggestion that while the claimant might possibly

have been entitled to compensation if he had been injured while riding a bicycle in the discharge of his duty to his employer, his claim was excluded because he happened to be using his own legs on the occasion when he fell. I do not think that Lord Dunedin meant to convey anything of the kind.

The respondents' counsel placed great reliance upon the decision of the House of Lords in *Warner* v. *Couchman*, [1912] A.C. 35, 49 S.L.R. 681, the case of a journeyman baker whose hand was frost-bitten while he was driving on his rounds in his employer's cart. The severe weather in this case was a natural cause which affected all persons residing in a considerable area, and not merely persons who had to drive along a particular road or roads. All that the House decided was that there was nothing in the evidence to disentitle the County Court Judge to find that there was no special connection between the employment and the accident. That decision seems to me to have no bearing upon the case before us. Counsel further relied upon the decision of the Court of Appeal affirmed by the House of Lords in *Kitchenham* v. *S.S. "Johannesburg,"* [1911] A.C. 417, 49 S.L.R. 626, [1911] 1 K.B. 523. The dicta of the Lord Chancellor (Loreburn) in that case must be construed in the light of the circumstances to which they applied. A sailor had left his ship on leave, but purely on his own business. He was drowned on his way back to the ship, but there was no evidence that he had reached the gangway which formed the special access to the ship from the quay. Accordingly from a legal point of view the case was exactly the same as if the sailor had met his death by being run over, or by slipping on ice and falling in the streets of a town which he had visited with permission of his employers, but for his own purposes. The ground of judgment is clearly explained in the following passage from the opinion of Fletcher Moulton, L.J., [1911] 1 K.B. 526, an opinion with which the Lord Chancellor stated his agreement. "A seaman would be perfectly entitled to occupy his hours of leisure in playing leap-frog or skylarking if he did not thereby break any rules. But an accident that occurs to him through his so doing might not be an accident arising out of his employment. Similarly, if a seaman went on shore in his hours of leisure with leave, and got injured in the traffic, that would not be an accident arising out of his employment. By going on shore with leave the seaman does not interrupt the course of his employment, but any accident that occurs during the period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public and not as one of the crew of the ship, and therefore is one which does not 'arise out of his employment.' But if, whether in his hours of leisure or not, it becomes necessary for him in fulfilment of his employment to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service on that ship." There is nothing either in the opinions or in the judgment in *Kitchenham's* case to indicate that compensation would not have been due if the seaman had left his ship on ship's business. This very point was referred to by Lord Loreburn, L.C., in his opinion in *Moore* v. *Manchester Liners Limited*, [1910] A.C. 498, at p. 500, 48 S.L.R. 709. After explaining that in his view an accident befalls a man "in the course of his employment" if it occurs "while he is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing," he continued, "It may seem at first sight that this is a formidable interpretation. It is not so in reality, because in every case the accident, to be a ground for compensation, must also be one arising out of the employment. A seaman, for example, who is on shore on leave and is knocked down by a waggon, is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business he is doing that errand in the same position as a messenger, and is protected against the same risks." The same view of the law underlay the judgments of the Court of Appeal and of the House of Lords in the recent case of *Parker* v. *S. "Black Rock,"* [1914] 2 K.B. 39, *aff.* [1915] A.C. 725. A fireman, who had gone on shore with leave to buy provisions, while endeavouring to return to his ship fell into the sea from a pier and was drowned. As Lord Parker of Waddington pointed out, [1915] A.C. at p. 730, the claim to compensation might have been sustained if the arbitrator had found as a matter of fact that this pier might be considered as the access to the ship, but there was no such finding. Accordingly the success of the claimant came to depend on the effect of the following clause in the contract of service—"Crew to provide their own provisions." The claim was disallowed, upon the ground that on a just construction of this clause the fireman owed no duty to his employers to go ashore to buy provisions. It was, I think, assumed that the case would have had a very different aspect if he had been held to have gone ashore on his employers' business. Of course I do not mean that in such a case his representatives would necessarily have been entitled to compensation, because it might have been proved or inferred that he had met his death through "skylarking" on the pier. On the other hand, I do not see how compensation could have been refused if it had appeared that he fell into the sea from the pier, or was run over, or slipped on ice and fell in the streets of a town while he was performing a duty imposed on him by his employers. That seems to have been the opinion of Cozens-Hardy, M.R., who said, [1914] 2 K.B. at p. 43—"It is beyond dispute that where a sailor meets with an accident on shore while fulfilling an obligation imposed upon him by his contract of service, the accident arose out of and in the course of his employment. For example, if the master sends him ashore on ship's business, and he is knocked down by a runaway

horse." In the House of Lords opinions substantially to the same effect were expressed. Thus Lord Parker of Waddington said, [1915] A.C. at p. 729—"In order to make it an accident arising out of the employment the absence from the vessel must be in pursuance of a duty owed to the employer. It appears to me that that is, shortly stated, the result of the decided cases."

For these reasons I am of opinion that the award of the arbitrator cannot be sustained, and that he ought to have awarded compensation to the appellant.

LORD MACKENZIE—An employer is only liable to pay compensation under the Workmen's Compensation Act if the accident which causes personal injury to the workman arises "out of" as well as "in the course of" the employment.

If the accident is due to a risk common to all mankind, the workman cannot recover compensation unless the incidents of his employment make that risk a peculiar danger of that employment. This is the meaning which has been put upon the words "arising out of," by a series of decisions in the Court of Session and in the House of Lords.

In the present case the arbitrator has decided what is a mixed question of fact and law. He finds in fact that it was the duty of the appellant, a machine-fitter, to go round to various places where the respondents had erected or executed repairs upon weighing-machines, to be present as representing the respondents at the inspection by the county inspector of weights and measures of such machines; that in pursuance of this duty, and in order to economise his employers' time, he decided to walk from one village to another, half-an-hour's walk, as there was no convenient railway communication; that the road was slippery from frost, and that he fell and broke his wrist. Upon the findings in the case the arbitrator came to the conclusion that the accident arose in the course of, but did not arise out of, his employment, and found that the workman was not entitled to compensation. Upon the question of fact this Court cannot interfere with the arbitrator if there was evidence upon which he was entitled to come to the conclusion he reached. I propose to defer expressing my view upon the conclusion the arbitrator has come to on the facts until after I have adverted to the law. The way in which the arbitrator regarded the law applicable to the case is made clear from the note, which has been printed in accordauce with the new Act of Sederunt. The concluding sentence is—"The risk which pursuer ran in walking upon a slippery road was not a risk to which he was exposed because of the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed." In taking this view of the law applicable to the case he proceeded upon one of the series of cases to which reference has been made. He did not in my opinion misdirect himself in point of law. The law, as had already been said, is, in my judgment, settled in Scotland and England to the same effect.

In the circumstances it would have been unnecessary to say more were it not that doubts have been suggested as to what the law in Scotland is, in consequence of certain dicta in *Hughes* v. *Bett*, 1915 S.C. 150, 52 S.L.R. 93. It is not necessary to say anything about the actual decision in that case. There is great room for difference of opinion in the application of the law to the facts of each particular case. The matter of concern is that the construction of a statute once it has been settled should be adhered to. It appears to me, with deference, that the dicta in *Hughes* v. *Bett* to which I refer proceed upon a misapprehension of the law laid down by the Lord President (Dunedin) and Lord Kinnear in *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15. The misapprehension arises from a failure to read the opinions *secundum subjectam materiam*. In *M'Neice's* case a salesman and collector in the employment of a firm of sewing machine manufacturers, whilst riding in the street on a bicycle in the course of his employment, was kicked on the knee by a passing horse and incapacitated for work. The reason why it was held that the accident arose "out of" the employment was, as put by the Lord President, this—"I think that it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as collector forced him to traverse the streets." This is in accord with what was said in the Court of Appeal in England—*Pierce*, [1911] 1 K.B. 997. In that case a collector and canvasser to an industrial company, whilst riding a bicycle in the course of his employment, was knocked down and killed by a tram car. He was found entitled to compensation. Cozens-Hardy, M.R., said—"I think that this man was more exposed than other people. His employment exposed him to the risks of the streets practically all day long, allowing only for the intervals of going inside the houses of the people he was visiting." Buckley, L.J., says—"He was thus exceptionally exposed to street accidents." The view of the law upon which the cases of *M'Neice* and *Pierce* proceeded was the same. If there was any room for doubt as to the meaning of the judgments in *M'Neice's* case there are other cases which make the matter clear. *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254, was a case where a plumber who was engaged in laying and jointing iron pipes in the open air on a day of unusual heat, and who had to stoop at his work, had taken ill while so employed and died some days afterwards from heat apoplexy. He was found not entitled to compensation. Lord Dunedin says—"I think it would be the very climax of absurdity to say that because a man had to go into the open air, and because he had to stoop, he was exposed to a peculiar danger because of his employment." His Lordship then gives as illustrating the point the peculiar dangers to which a collier or a sandwichman are exposed. Lord Kinnear also bases his judgment on the ground that there was no special risk. In *Rodger* v.

Paisley School Board, 1912 S.C. 584, 49 S.L.R. 413, the same was said. That was the case where a school janitor, conveying a message on school business through the streets of Paisley about noon on a hot July day, was overcome by giddiness or faintness brought on by the heat, and fell, struck his head against the pavement, and sustained injuries of which he died. He did not get compensation. Lord Dunedin said—"The ground upon which I think it is quite clear that the man's accident did not arise out of his employment is that I do not think his employment in any way subjected him to the particular class of accident in consequence of which he died." He then expressly approves of the illustration of the railway guard given by Buckley, L.J., in *Fitzgerald* v. *W. & G. Clarke & Son*, [1908] 2 K.B. 786, and adds—"There may be a danger to which a man's employment specially subjects him which may consist not so much in the actual quality of the thing itself but in the constant recurrence of certain conditions." Lord Kinnear in considering the meaning of "out of" says this—"I think it is now well settled that in order to satisfy that condition it must be shown that the injured man suffered in consequence of a risk incidental to his employment—that is to say, a risk beyond what ordinary people incur in the ordinary course of their business, but one to which he was specially exposed by the nature of his employment." With this case may be contrasted *Wicks* v. *Dowell & Company, Limited*, [1905] 2 K.B. 225. The same law was laid down in *Millar* v. *The Refuge Assurance Company, Limited*, 1912 S.C. 37, 49 S.L.R. 67, in which a collector for an insurance company fell on a stair which he had occasion to use in the course of his employment and sustained injuries. Lord Dunedin, after saying there is no difficulty in stating the law and referring to the case of *Kitchenham*, [1911] 1 K.B. 523, goes on—"The distinction that is there drawn is between accidents which happen to a man, and are, so to speak, brought upon him by his business, and accidents which, although a man may be in one sense upon his business, are just accidents which may happen to everybody." Lord Kinnear says—"The general rule, as stated by the Lord Chancellor, is that if an accident arises from a risk that is common to everyone, and not specially connected with the work and employment of the person claiming compensation, then it cannot be said to have arisen out of his employment in the sense of the Act." Both Lord Dunedin and Lord Kinnear point out the difficulty of applying the law. The reason why the collector in *Millar's* case got compensation was because he was held to be in the position of the sandwichman, and Lord Kinnear expressly negatives the argument put forward by the employer in that case, which was this—"It is said that this tripping upon a stair is a thing which might happen to anybody who goes up and down a stair, and therefore is a risk which is not specially connected with the particular work of the respondent." The law, as regards the First Division, was settled by the foregoing among other cases. The view of the Second Division is the same. In *Guthrie* v. *Kinghorn*, 1913 S.C. 1155, 50 S.L.R. 863, it was held there was no special risk distinguishing the case from *Adamson* v. *Anderson & Company*, 1913 S.C. 1038, 50 S.L.R. 855, a First Division case, where it was held in somewhat similar circumstances that the risk was special to the employment. But there was no difference as to the law. The case of *Simpson* v. *Sinclair*, 1915, 53 S.L.R. 94, was decided by the Second Division on 10th November after *Hughes* v. *Bett*, which was cited. In it the doctrine of special risk was expressly recognised.

In my opinion the law stated by Lord Johnston in *Hughes* v. *Bett* is consistent with the previously decided cases—"That the accident should arise 'out of' the employment it must be occasioned by a risk incidental to the employment. A risk incidental to the employment may also be a risk common to the public. That a risk common to the public should be a risk incidental to the employment the employee must be exceptionally exposed by his employment to the common risk."

The principle which has been applied in construing the statute in the Court of Session is the same as that adopted by the Court of Appeal in England, and it has been sanctioned by the House of Lords in cases which are binding upon us. *Warner* v. *Couchman*, [1911] 1 K.B. 351, *affd.* [1912] A.C. 35, 49 S.L.R. 681, is an illustration of difference of opinion as to the application of the principle. There was no difference of opinion as to the principle itself. That was a case of a journeyman baker, who was refused compensation. His hand had been injured by frostbite while driving on his rounds in his employer's cart in winter. The ground of judgment was that the workman was not exposed to peculiar danger beyond that which other drivers of vehicles or persons engaged in outdoor work on that day had experienced, and consequently that the accident had not arisen "out of" his employment. To refer first to the judgment in the Court of Appeal, Cozens-Hardy, M.R., [1911] 1 K.B. 351, at p. 353, says—"It remains to consider the words 'out of.' If I may venture to quote my own words in *Craske* v. *Wigan*, [1909] 2 K.B. 631, at p. 635, where a cockchafer frightened a lady's-maid sitting at her open window, with the result that her eye was injured, 'it is not enough for the applicant to say "the accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further and must say "the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger." To the same effect Fletcher Moulton, L.J.—"The true issue could not be better expressed than it was by the Irish Court of Appeal in *Kelly* v. *Kerry County Council*, 42 I.L.T. 23, when dealing with the question of the death by lightning of a man working on the roads. They found that the accident did not arise out of his employment, because there was no evidence that in following his employ-

ment he ran any greater risk of being struck by lightning *than any other person who was within the area of the storm.* This was a sound view by reason of the fact that lightning is indiscriminate in its action, and persons at home or abroad, at work or unemployed, run substantially equal dangers. But when the case arose of a man who by reason of his employment was exposed to the danger of lightning to a greater degree than other persons within the area of the storm this Court, in *Andrew* v. *Failsworth Industrial Society, Limited*, [1904] 2 K.B. 32, held that the accident arose out of the employment. . . . The case of extreme heat or extreme cold is similar to that of such a natural agency as lightning, excepting that it is easier, as in this case, to show the direct connection between the accident and the employment. But the rule is the same. If the employment brings with it greater exposure and injury results, that injury arises out of the employment." Farwell, L.J., takes the test as stated by Lord Collins in *Andrew* v. *Failsworth*—"'Was the man exposed to something more than the normal risk which everybody, so to speak, incurs at any time and in any place' when driving in an open trap on a very cold day with rain and sleet at intervals?" In the House of Lords, [1912] A.C. at p. 37, the Lord Chancellor (Loreburn) quoted with approval the following passage from Fletcher Moulton, L.J., which immediately precedes that quoted above—"It is true that when we deal with the effect of natural causes affecting a considerable area, such as severe weather, we are entitled and bound to consider whether the accident arose out of the employment or was merely a consequence of the severity of the weather to which persons in the locality, and whether so employed or not, were equally liable. If it is the latter it does not arise 'out of the employment,' because the man is not specially affected by the severity of the weather by reason of his employment." The Lord Chancellor then says—"In substance the learned County Court Judge seems to me to have found in this case the man was not specially affected by the severity of the weather by reason of his employment. . . . If so, I see nothing in the evidence which disentitled him to find that fact, and being so found as a fact, it is binding." The same law was previously laid down in *Kitchenham.* The Lord Chancellor says—"I think the accident arose from a risk common to everybody, viz., that of falling from the quay into the water, and was not specially connected with his work and employment." In *Plumb's* case, 1914 A.C. 62, the judgment of the house was delivered by Lord Dunedin, who stated that he thinks the point is very accurately expressed by the Master of the Rolls in the case of *Craske* v. *Wigan* in the passage quoted *supra*, and adds—"A risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind and not accentuated by the incidents of the employment."

The most recent illustration of the application of the principle is *Cooper* v. *North-Eastern Railway*, 1915, 32 T.L.R. 131, a case in the Court of Appeal which arose out of the bombardment of Hartlepool.

Unless the view of the statute be as above stated, the result would be that there is no distinction between "in the course of" and "arising out of." The latter words would be struck out.

Coming back to the facts, I think that the case is not free from difficulty. On the facts found, however, I think the arbitrator was entitled to come to the conclusion he did. Therefore this Court, even if it did not agree with the arbitrator, cannot touch his award.

The question should have been framed "Whether upon the facts found the arbitrator was entitled to hold that the accident to the appellant did not arise out of his employment." So put, the answer should, in my opinion, be in the affirmative.

LORD PRESIDENT—I concur in the opinion of Lord Skerrington, which I have had an opportunity of reading. The arbitrator, who is final on questions of fact, has found here as a matter of fact that the appellant in pursuance of his duty had to walk from Forrestmill to Kennet on the day that the accident befell him. The day was frosty; the road was slippery. The familiar maxim *in medio tutissimus ibis* seems to have commended itself to the appellant, but a butcher's van coming up behind him caused him to step to one side of the road, where he slipped, fell, and injured himself.

It is common ground that the accident arose in the course of the appellant's employment. The question for our decision is whether it arose out of his employment. Now the learned arbitrator came to the conclusion that it did not, because the risk which the appellant ran in walking upon the slippery road was not a risk to which he was exposed by the nature of his occupation, but was simply an ordinary risk to which every pedestrian was exposed.

In my view that is an unsound statement of the law, for the risk on that road at that particular time appears to me to have been a risk incidental to the man's employment. And it was not the less a risk incidental to the man's employment because every pedestrian on that road at that time would have required to face it, or because the appellant was facing it for the first and, it may be, the only time.

I am wholly unable to distinguish this case from the case of *Hughes* v. *Bett*, 1915 S.C. 150, 52 S.L.R. 93. It followed, I think, and was completely in accord with the decisions in this Division of the Court in the cases of *Millar*, 1912 S.C. 37, 49 S.L.R. 67, and *M'Neice*, 1911 S.C. 12, 48 S.L.R. 15, and of the English Court of Appeal in the case of *Pierce*, [1911] 1 K.B. 997. The principle which, it appears to me, lies at the root of these decisions, and which distinguishes them and marks them out from other cases more or less germane to this chapter

of law, was never better stated than in the passage from Lord Kinnear's opinion in the case of *M'Neice*, which I venture once more to quote, where he says—"According to the statement, the man had certainly, in the course of his employment to traverse this particular road for his employers' purposes, and therefore the dangers and risks of that particular road at the time and on the occasion in question are, to my mind, incidental to the employment." And I think when Lord Kinnear said that he was stating the law with fulness and accuracy. And quite obviously, I think, his statement would not have been in any way affected—is not in any way affected—by the consideration that other pedestrians might have to face that particular risk if they were on the road at the time, or that the workman was on the road for the first and, it may be, the only time.

I am therefore for answering the question as put to us in the affirmative, although I agree with both your Lordships that the correct form of question is as suggested by Lord Skerrington.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative.

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Counsel for the Respondents—Moncrieff, K.C.—MacRobert. Agents — Macpherson & Mackay, S.S.C.

HOUSE OF LORDS.

Wednesday, December 15.

(Before Earl Loreburn, Lord Dunedin, Lord Atkinson, Lord Shaw, and Lord Wrenbury.)

WALKER *v.* WHITWELL.

(In the Court of Session, March 20, 1914, 51 S.L.R. 438, and 1914 S.C. 560.)

Writ—Authentication—Signature of a Witness Adhibited not at the Time of Grantor's Signing — Conveyancing (Scotland) Act 1874 (*37 and* 38 *Vict. cap.* 94), *sec.* 39.

A witness to a deed cannot adhibit his signature to the deed after the death of the party to whose signature he was a witness.

Tener's Trustees v. *Tener's Trustees*, (1879) 6 R. 1111, 16 S.L.R. 672, *disapproved.*

Dicta on the attestation of deeds.

This Case is reported *ante ut supra.*

Whitwell appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—I do not propose to enter in detail upon the various Acts and decisions in Scotland which have been discussed at the Bar, because they are to be fully considered by those of your Lordships who are specially familiar with the law and practice. I shall merely offer to your Lordships certain considerations arising out of the facts of this case which appear to me of general importance.

There is ground for supposing that, owing to an erroneous view of the law, Dr Walker was neither empowered nor expected to attest this will as a witness at all. Manifestly an attestation by anyone merely interposing of his own accord would be nugatory, but it is not, in my opinion, necessary to prove an express request by the testator. Wills are often made by persons who are quite clear as to their intentions, and signify them by their signature. If such a person engages a solicitor or a friend to help him in making his will the circumstances might quite well be such as to warrant a conclusion that he impliedly authorised the procuring of witnesses to see him sign and attest his signature in order to carry out his governing intention, though he may not have been himself acquainted with the law. But that is not this case.

Questions have been raised as to the authority of a witness to sign *ex intervallo.* This point does not arise here, because it also is superseded by the other point, namely, that the signature was after the maker of the will had died. I will only say that the opinion of the Court of Session in *Frank's* case (M. 16,824), namely, "there never ought to be any considerable interval, yet when such a case occurs it must be judged of upon its whole circumstances," seems to me very wise and just and of very general application. A long interval, if unexplained, ought to be fatal, though I should call the quarter of an hour which was the period in that case a short interval. But any real interval calls for explanation. It may be that weeks or months will prove no impediment to the validity of an attestation, as, for example, if a request to sign from the maker of an unattested deed is proved. It is not easy to lay down a rule more precise than that which I have cited from *Frank's* case.

In my opinion, however, the real point in this appeal is that Dr Walker, whose complete integrity is unquestioned, adhibited his signature after the death of the maker of the will. There has been much difference of opinion in the Court of Session. I come to the conclusion that the appeal must be allowed with much regret, because I believe that the deceased lady intended to dispose of her property in terms of this will; and with some misgivings, because I am differing from eminent Judges, though sustained by other high judicial authority.

But what I feel most strongly is this. Every civilised system of jurisprudence—at least all that are known to me—requires certain definite solemnities before allowing a testamentary disposition to have effect, as that it must be holograph or duly attested. The opportunity for fraud is so great, the temptations of self-interest are so liable to distort even an honest recollection, and the hardship so manifest if a man's fortune is disposed of by loose proof, that it has been judged necessary to insist upon certain precautions or a choice of certain precautions.