The Court recalled the interlocutor of the Lord Ordinary and granted decree as craved.

Counsel for Pursuers (Reclaimers) — Morison, K.C. — Spens. Agents — Boyd, Jameson, & Young, W.S.

Counsel for Defenders (Respondents) — Horne—W. T. Watson. Agents—Whigham & MacLeod, S.S.C.

HOUSE OF LORDS.

Thursday, July 29.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Atkinson, Lord Gorell, and Lord Shaw of Dunfermline.)

JACKSON *v.* GENERAL STEAM FISHING COMPANY, LIMITED.

(In the Court of Session, November 7, 1908, 46 S.L.R. 55, 1909 S.C. 63.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the course of his Employment*"—*Sphere of Duty—Deviation—Watchman on Returning to Sphere after Obtaining Refreshment—Fact and Law.*

A watchman was employed to look after some trawlers while lying in a harbour, his duties extending from Saturday afternoon to Sunday afternoon, a period of 25 hours. He supplied his own food, which was sometimes brought him by members of his family. It was necessary for him at times to be on the quay. On Saturday night he went to an hotel a short distance from the quay, had half-a-glass of whisky and a glass of beer, and on returning to the quay proceeded to descend a fixed ladder to get on board one of the trawlers, when he slipped, fell into the water, and was drowned. He had only been absent at the hotel a short time.

Held (*rev.* judgment of the Second Division) that there was evidence to support a finding by an arbiter that the accident was one "arising out of and in the course of" the employment; *per* Lords Ashbourne, Atkinson, and Shaw, on the ground that the watchman had returned to, and was within, the sphere of his duty when the accident occurred; and *per* Lord James, on the ground that the obtaining of refreshment was necessary for the fulfilment of his duty—*dissenting* the Lord Chancellor, on the ground that though the watchman had arrived within the ambit of his duty, he was not on the ladder in the course of it, but in returning to it; and Lord Gorell, on the ground that the duty of watching prohibited the watchman's being away, and while he was entitled to be on the quay, there was no proof, the *onus* being on the claimant, that the watchman was there in connection with his duty. *Authorities reviewed.*

Observations, per Lord Shaw, *approving and applying Henderson* v. *Glasgow Corporation*, July 5, 1900, 2 F. 1127, 37 S.L.R. 857, to the effect that where an arbiter is of opinion that the question whether an accident is one arising out of and in the course of the employment is purely one of fact, he is entitled so to find and to refuse to state a case.

This case is reported *ante ut supra.*

The facts are given in the previous report and in the opinion *infra* of Lord Atkinson.

The claimant Mrs Low or Jackson appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The only question in this case is whether or not there was evidence upon which a reasonable man could find that the accident which caused the death of the deceased arose out of and in the course of his employment. If there was such evidence, this appeal must be allowed, for the Sheriff-Substitute answered the question in the affirmative. No doubt this is often a difficult point to determine, and it does not imply any reflection upon the judgment of a Court of First Instance that an Appellate Court, on a more mature examination, is unable to agree.

I assume as incontrovertible the findings in fact of the learned Sheriff-Substitute, but I cannot see that they contain anything which upon a fair construction warrants the conclusion at which he arrived. The place at which this accident occurred, namely, the fixed ladder which the deceased descended in order to get on board one of the trawlers, was within the ambit of his duty, in the sense that he had sometimes to be on the quay, and therefore might sometimes be obliged to use this ladder to get there from the trawler or thence to the trawler. This comes to no more than that he might be on the ladder in the course of his employment.

Still the question must be answered in this case, Was he on the ladder in the course of his employment, and did the accident arise out of that employment? It seems to me not to have been so. The only view I can take of the evidence is that this unfortunate man quitted his employment in order to go to the hotel and obtain refreshment, and that he was on the ladder on his return from that excursion. If he had remained at his duty he might imaginably have used the ladder to get on the quay and to return in the course of that duty. In fact, when he used it to return to the trawler he was not there in the course of duty, but in the course of returning to it.

I do not think the provisions of a remedial Act, such as this Act is, ought to be construed in any narrow spirit. When a man is employed, especially for so long a time, he is not usually expected to be at work unceasingly without either rest or pause. Everything, of course, must depend upon the nature of what he has to do, but allow-

ance should be made for the ordinary habits of human nature, and the ordinary way in which those employed in such an occupation may be expected to act. A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety. It is always a question to be solved by good sense on the facts of the particular case, and not much help can be given by attempts to formulate in more precise language the meaning of the words used by parliament. In the present case everyone must be sorry for those who have suffered by this deplorable accident, but I cannot find evidence justifying the conclusion of the learned Sheriff-Substitute.

LORD ASHBOURNE—The question in this case arises on a simple state of facts, as to which however different minds may arrive not unreasonably at different conclusions.

Did the accident which caused the death of the deceased arise out of and in the course of his employment? Was there evidence on which such conclusion might reasonably be founded?

The deceased was employed to watch trawlers in Granton Harbour between the voyages, and sometimes it was necessary for him to be on the trawlers and sometimes on the quay. He had to provide his own food, which was sometimes brought to him by members of his family, but it is not found that he was prohibited from leaving the ambit of his duty for a short and reasonable time to get refreshment.

On the evening of the 22nd February he left the trawlers and went to an hotel which is a short distance from the quay to get some refreshment, and was absent for a very short time. On returning to the quay he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned. Hence the question—Did the accident arise out of and in the course of his employment? or rather, Is there evidence to support such a finding?

The Sheriff-Substitute found on the facts for the claimant, but the Lord Justice-Clerk and the Judges of the Second Division decided that the accident happened while the deceased was absent from the scene of his duty, and that when he was going back he was not in the course of his employment, because he had no right to be away.

If the deceased had met with a fatal accident at the hotel or before he had returned to the scene or sphere of his duty, I would be disposed to concur, but the workman had returned to the quay where he had a right to be, and was about entering a trawler where he had a right to go. He was within the scope and scene of his duty on both quay and trawler; he had a right to leave the trawler for the quay and the quay for the trawler. He was not at the time of the accident going back to, or returning to, his employment; he had already, I think, come back when he had reached the quay, and was ready to resume his watch (*Moore* v. *Manchester Liners Limited*). He had a long guard or watch of 25 hours and if it was intended that he should have no right to go "a short distance for a very short time" for refreshment, it would have been more satisfactory if there had been some finding on the subject.

On the facts as admittedly before us I arrive at the conclusion that there was evidence that the accident arose out of and in the course of his employment, and I move your Lordships that the appeal be allowed with costs.

LORD JAMES OF HEREFORD — In my opinion this appeal should succeed.

The Sheriff-Substitute has found that the deceased man Robert S. Jackson met with an accident causing his death arising out of and in the course of his employment by the defendants.

This finding may, dependent on circumstances, be regarded as one of law or of fact. If there was no evidence to support the finding, a question of law arises. If there was conflicting evidence bearing upon the issue raised, the question must be regarded as one of fact.

My opinion is that there was evidence to support the finding of the Sheriff-Substitute, and I further think that such finding was correct.

There was no contract on the part of the deceased man to remain on board the trawlers. His contract could have been performed if he were on the quay.

But he left both vessels and quay for the purpose of obtaining refreshment. It must have been contemplated that during the long hours of his continuous service (25 hours) the deceased would need and obtain refreshments. As a rule there was no need for him to leave the quay to obtain them, but on the night of the accident the usual supply failed, and the deceased obtained refreshment at a neighbouring hotel. No argument appears to have been raised on the nature of the refreshments obtained.

After leaving the hotel the deceased man returned to the quay, a place where, as I have said, he might rightly be when discharging his duties. Passing from such place in order to reach one of the trawlers he fell off a ladder and was drowned. It seems that this case differs clearly from that of *Reid* v. *The Great Western Railway Company*. In that case the deceased, in breach of his duty, left his engine and crossed the railway line in order to purchase a magazine. Such act in no way arose out of his employment, nor was it in the course thereof.

In this case the obtaining of refreshment was necessary to the performance of the deceased's duties. His passing to and from the hotel, in my opinion, arose out of and was in the course of his employment.

The appeal must therefore prevail and be allowed, with costs.

LORD ATKINSON—This is an appeal from the judgment of the Second Division of the Court of Session in Scotland pronounced upon an application made on behalf of Mrs Mary Ann Low or Jackson, widow of Robert Slimon Jackson, deceased, formerly a watchman in the respondents' employment, to require the arbitrator, the Sheriff-Substitute of the Lothians and Peebles, to state a case for the opinion of the said Division in reference to his decision upon a claim made by her under the Workmen's Compensation Act 1906 for compensation in respect of the loss sustained by her by reason of her husband's death by drowning while in that employment. The arbitrator, who had found that the accident by which the deceased lost his life arose out of and in the course of his employment with the respondents, and awarded the widow £150 as compensation, had refused to state a case on the ground that the above-mentioned finding was a finding on an issue of fact, not an issue of law.

The respondents presented a note to the above-mentioned Division of the Court of Session setting out certain statements of fact which they alleged were admitted or proved. The arbitrator apparently revised these statements of fact to bring them into conformity with the evidence. On the application coming on, the Court of Session decided that the Sheriff-Substitute was bound to state a case, and it was thereupon agreed between the parties that instead of the case being remitted to him to have a case formally stated, it should be disposed of "as if upon a case stated" by him in the terms of the statute. The statements of fact in the above-mentioned note, with the exception of No. 10 thereof, were treated as findings of fact in the case stated, and finding No. 10 was taken as reading thus—"Having found in fact in terms of the foregoing findings, I further found that the accident arose out of and in the course of the employment of the deceased with the defenders." And that the question of law for the consideration of the Court should be as if stated as follows, viz.—"On the facts so admitted or proved was the Sheriff-Substitute right in holding that the deceased man was killed by an accident arising out of and in the course of his employment with the appellants in the sense of the Workmen's Compensation Act 1906, section 1, sub-section 1?" The statements of fact, other than No. 10, material for consideration in deciding this question of law were as follows:—"(3) That the said Robert Slimon Jackson was in the employment of the appellants, his employment being to watch the trawlers while they lay at Granton Harbour between their voyages; (4) that about 4 p.m. on Saturday, 22nd February 1908, he went on duty as watchman of four trawlers belonging to the appellants moored to Granton Quay, his duty in connection with these being expected to terminate about 5 p.m. on the following day; (5) that in connection with said duty it was necessary for him to be at times on the quay at Granton; (6) that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family; (7) that on the night of said Saturday, 22nd February, between 9 and 10 p.m., he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment; (8) that the refreshment partaken of by him at the hotel consisted of half a glass of whisky and a glass of beer; (9) that he was absent from the boats for a very short time, and on returning to the quay, along with two friends, he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned; (10) that said accident arose out of and in the course of his employment with the defenders."

The Second Division of the Court of Session decided that the deceased was not in the course of his employment when he met his death, and remitted it to the arbitrator (the Sheriff-Substitute) to recal his award and dismiss the applicant's claim. Your Lordships having decided that owing to the above-mentioned consent the parties are to be taken to be in the same position as if a case had been regularly stated, it only remains to consider the decision of the Second Division on the above-mentioned question of law.

That question of law, however, must, according to many decisions of your Lordships' House, as well as of other tribunals, necessarily resolve itself into this—Was there evidence given before the Sheriff-Substitute upon which he might reasonably have found that the accident by which the deceased met his death "arose out of and in the course of his employment"? It is not quite clear from the form of the interlocutor of the Second Division whether that Court meant to decide this question of law in the negative or meant to decide as a question of fact on the findings that the deceased was not in the course of his employment when he met his death. As the Court would have no jurisdiction to decide a question of fact, they must I think be assumed to have decided the question they had jurisdiction to decide and none other.

In cases under the Workmen's Compensation Act of 1906, the *onus* of proving the conditions which must be fulfilled in order to obtain an award rests upon the applicant. He or she must in a case such as this establish that the accident causing the injury not only happened during the workman's employment but also arose out of and in the course of his employment. If the facts proved are equally consistent with the existence or non-existence of the essential conditions, then the applicant must, on the principle of *Wakelin* v. *London and South-Western Railway Company*, 12 App. Cas. 41, fail.

One of the difficulties arising in this case is due to the ambiguity of the findings of the arbitrator as to the terms on which the deceased was employed. One would

have supposed that it would have been easy for him to have ascertained and expressly found whether the deceased was employed upon the terms that he should not absent himself from the boats and quays to procure refreshment, or for any other purpose, during his long watch of 25 hours, or on the terms that he might absent himself to procure refreshment when the necessities of human nature reasonably required that he should do so.

The very nature of his duties may in itself imply that he was bound never to leave his post. On the other hand, since it would be quite unreasonable to expect that he could subsist for such a time without procuring nourishment, it might be implied from the very length of his vigil that it was a term of his contract that he might absent himself when necessary to obtain refreshment. What the Sheriff has found is (5) "That during the 25 hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his own family." But to my mind that leaves it quite uncertain whether or not it was a term expressed or implied of his contract of service that all food or refreshment which he might require should be brought by him or to him to the place or places from which he was to watch.

On the facts and findings as they appear, it is, I think, impossible to say whether or not there was substantive evidence before the arbitrator to the effect that the deceased was not, according to the terms of his employment, entitled to absent himself to procure refreshment, and accordingly, if he had met with the accident before he had returned to the quay, I should have been inclined to hold that the claimant had failed to discharge the particular burden of proof which, as I have indicated, rested upon her. But the fact that the accident happened after he had returned to the quay alters, in my view, the whole position.

If his duty had been to keep watch on board some particular one of those four trawlers, and if he had returned to his ship before the accident befel him, then I think, on the authority of *M'Donald* v. *Owners of the Steamship "Banana,"* 1908, 2 K.B. 926, and *Moore* v. *Manchester Liners, Limited,* 1909, 1 K.B. 417, it would have been rightly held that the accident arose "out of and in the course of his employment," even although he had gone in search of refreshment in violation of his duty. While if the accident had occurred, as it did in fact occur in this case, before he had reached the particular trawler, it would, on the contrary, have been rightly held that the accident did not arise "out of and in the course of his employment." The crucial question, according to these authorities, apparently being whether the employee had, before the accident befel him, reached the place where he was to discharge the duties of his employment.

In the present case the deceased could not discharge his duty by remaining in any one of the four boats. He was to watch over all of them and over the moorings of each. In weather such as that which on this night prevailed he was entitled to visit, indeed if not bound to visit, each of them, and entitled to go on board any of them and remain there for some time. His field of operations, so to speak, embraced this quay, the trawlers, and the means of approach to each of them. At the time the accident happened he had a right to be at the place in which he actually was. Had he, on his return from the public-house, examined for a moment the mooring of the boats and then proceeded to go on board one of them, as he in fact attempted to do, it could scarcely be contended that, despite the alleged impropriety of his visit to the public-house, the accident had not arisen "out of and in the course of his employment," since he would then immediately upon his return have entered upon the active discharge of one of the duties he was hired to discharge; and from that moment would have been in the same position as if he never had left at all. Or again, if during the night he had, after seeing the boats were all secure, gone ashore to walk up and down the quay, not in order to watch his boats but to keep himself warm, and had on attempting to return to the trawler from which he had gone on shore, met with an accident such as he in fact met with, it could not, I think, be contended that this accident had "not arisen out of and in the course of his employment," on the ground that he was employed to watch and not "to warm himself."

The duty of the deceased was to be at this quay and to take care of these boats. In the discharge of his duty he was entitled to pass from quay to trawler and from trawler to quay, when and as often as he pleased during the 25 hours on which he was on the watch. Once he returned to the quay the so-called "deviation" was, I think, at an end, and the deceased was thenceforward, *quoad* the quay, the boats, and the approaches to them, in the same relative position as the steward was to his ship in *Robertson* v. *Allan Brothers,* 98 L.T. 821. In that case the steward went ashore on his own business, returned to his ship by a skid—a prohibited means of approach—and on stepping from this skid to the deck of the ship he stumbled and fell into a hold.

The Master of the Rolls in his judgment in *Moore* v. *Manchester Liners, Limited,* at page 420 of the report, deals with that case thus. He says—"Nor do I see any inconsistency between that case (*M'Donald* v. *Owners of Steamship 'Banana'*) and the case of *Robertson* v. *Allan Brothers & Company.* If a sailor has been out for his own amusement, whether with or without consent, his right to protection under the Act is complete when once he has got back on board his vessel. In *Robertson* v. *Allan* the man fell through an open hatchway into the hold."

If, on the contrary, it should be held that the "deviation" had not terminated when the deceased arrived at the quay, it is difficult to see when or at what particular place it could be held to terminate. If it

should be held to continue till he had reached the particular boat, or place in that boat, from which he originally departed to carry out his unauthorised enterprise, then if he went to another trawler or remained on the pier, no matter how employed, it would still continue, while if the resumption of the active discharge of his duties be the point of termination, then it is difficult to see how the deceased could be considered to have resumed his duties more effectually by returning to the trawler he had left and going to sleep there than by remaining awake upon the quay.

In such a case as this, where the workman had before the accident occurred returned to a place in which he was to discharge his duties and in which for all that appears in the findings he may in fact have entered upon the active discharge of them, the question is what in the absence of all evidence as to whether he had so engaged in the discharge of them or not, the presumption should be. Should it be that the alleged deviation terminated on his arrival at that place, even though he had not reached the particular spot in the field over which his employment extended from which the alleged deviation began, or is the deviation to be presumed to continue and is he to be taken to be still engaged in carrying out his own unauthorised enterprise until he reaches that spot.

In my view it is in this case a choice between these two presumptions. I think the former is the fairer and more reasonable, although of course the fact that so many of my noble and learned friends differ from me deprives me of much confidence as to the soundness of the conclusion at which I have arrived.

For these reasons I am of opinion that there was evidence on which the Sheriff might reasonably have found, as he did, that the accident arose out of and in the course of the deceased's employment, and therefore think that the judgment of the Court of Session was erroneous and should be reversed, and this appeal be allowed with costs.

LORD GORELL—The question in this case is whether there was evidence before the Sheriff-Substitute upon which he was entitled to find that the accident which caused the death of the appellant's husband Robert Slimon Jackson arose out of and in the course of his employment with the respondents. The Sheriff-Substitute found the facts to be as stated in the note set out in the appellant's case, but refused to state a case. On an application to the Second Division of the Court of Session to compel him to do so, it was agreed that instead of the case being remitted it should be disposed of as if, upon a case stated in terms of the statute, the statements of fact in the said note, with the exception of No. 10, were held as findings of fact in the case stated, and that finding No. 10 should be taken as reading, "Having found in fact in terms of the foregoing findings, I further find that the accident arose out of and in the course of the employment of the deceased with the defenders." The Sheriff-Substitute awarded £150 compensation to the widow, the appellant. The Second Division held that the deceased was not in the course of his employment when he met his death, and set aside the award.

The findings show that the deceased was employed by the defenders to watch certain trawlers while they lay at Granton Harbour between their voyages, and that in connection with his said duty it was necessary for him to be at times on the quay at Granton.

It seems that the trawlers were moored at Granton Harbour from Saturday afternoon to Sunday afternoon (22nd and 23rd February 1908), that the deceased went on duty at 4 p.m. on the Saturday, and his duty would terminate at 5 p.m. on the Sunday, and that during the 25 hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family. Considering that his duty was to watch continuously, no doubt to keep the boats free from fire, burglary, and accident of any kind, and to watch the moorings as mentioned in the findings, it is clear that he could not discharge that duty properly if he were to leave the trawlers during any part of the 25 hours. The finding as to food cannot, having regard to the nature of the duty, mean that he might absent himself to procure food. I think it must mean that he either had to bring his food with him or members of his family brought it to him. He would naturally have the use of the accommodation on the trawlers, or one of them. There is no finding that it was an ordinary incident of his duty to leave the trawlers to obtain food, and if this were the case it should have been proved by the claimant. It may at first sight seem hard that the deceased should be expected to be continuously on duty for 25 hours, but it must be remembered that this duty was only between the voyages of the trawlers, which are moored from Saturday afternoons to Sunday afternoons.

In my opinion the findings establish that the deceased had no business to leave his duty of watching.

It is, however, found that on the night of the Saturday, between 9 and 10 p.m., he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment, and there had half a glass of whisky and a glass of beer; that he was absent from the boats for a very short time, and on returning to the quay along with two friends, proceeded to descend the fixed ladder for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned.

It is incumbent upon the claimant to prove that the accident arose out of and in the course of the deceased's employment. If he had met with an accident while away from the trawlers and quay, I should think that there can be no doubt such accident would have been while he

was about his own pleasure and not about the business of his employers, and the only difficulty which I feel about the case is whether it can be said that because he had returned to a point where he might at times be said to have some duty to perform, he could be considered as engaged on his duty though not actually doing work, but upon reflection I have come to the conclusion that this fact does not establish that the accident arose out of and in the course of his employment.

In the first place I notice that the finding (5) is, that in connection with said duty it was necessary for him to be at times on the quay at Granton, but there is nothing whatever to show that at the time in question it was necessary for him to be on the quay in connection with his duty, and it seems to me clear that he was exposing himself to danger for his own purposes and not in any way in connection with his duties, and that the accident did not arise out of his employment. Secondly, the case differs entirely from such a case as *Robertson* v. *Allan Brothers & Company*, 98 L.T. 821, where a steward employed aboard a ship went ashore while the ship was discharging cargo in port during hours when he was at liberty to do so, and returned on board to some extent under the influence of drink by a cargo skid instead of by the ordinary gangway, and fell down an unguarded hatchway into the hold. There the man was returning to the ship in pursuance of his obligation to return to duty at some time after being on leave ashore which would enable him to begin his work at the proper time; the return after leave was a normal and natural incident arising out of the employment.

In the present case, assuming that the deceased had no business at all to go to the hotel, except his own pleasure, as I think was the case, his return was not a normal and natural incident arising out of his employment, and, further, the mere fact that he had reached the locality where his duties lay does not necessarily determine that an accident to him in that locality arises out of and in the course of his employment—See *Smith* v. *The Lancashire and Yorkshire Railway*, 1899, 1 K.B. 141.

The case of *M'Donald* v. *The Owners of the Steamship "Banana,"* 1908, 2 K.B. 926, does not assist in the decision of the present case, for all it decided was that the claimant had in the circumstances failed to prove that the accident arose out of or in the course of her husband's employment. In the case of *Moore* v. *Manchester Liners, Limited*, 1909, 1 K.B. 417, the accident happened to a fireman before he actually got back to his vessel, and although the circumstances were such as to enable the majority of the Court to decide against the claimant, because the deceased had not actually returned on board his vessel, I cannot regard this as deciding that in every case it necessarily follows that because a man is at the place where he has duties, every accident to him there arises out of and in the course of his employment. That would not be consistent with the decision in *Smith* v. *Lancashire and Yorkshire Railway*. No doubt, generally speaking, it may be easy to prove or infer that if a man meets with an accident at the place where his duties lie, the accident arose out of and in the course of his employment; but still it is a question of evidence, and if the evidence demonstrates that at the time and place he was engaged for his own pleasure upon something altogether outside his employment, I fail to see how it can with reason be said that the accident arose either out of or in the course of the employment. In order that the claimant may recover, the accident must arise out of as well as in the course of the employment.

It may be difficult in some cases, where a man has been away without leave and has returned to his place of work, to say that he has not resumed his employment; but in the present case the findings show that the deceased was not doing, or intending to perform, any duty on the quay, and was returning to one of the trawlers, having not yet finished the excursion which he had made for his own purposes. If the accident had occurred while he was on the same ladder, going away from the trawlers for his own purposes, I should have thought it would be reasonably clear that no claim could be maintained, and I can see no material difference between such a case and the present one.

In my opinion there was no evidence which would entitle the Sheriff-Substitute to find that the accident arose out of and in the course of the deceased's employment with the defenders, and I agree with the decision of the Second Division and think this appeal should be dismissed.

LORD SHAW OF DUNFERMLINE — The learned Sheriff-Substitute sat in this case as arbitrator under the Workmen's Compensation Act, and made the twelve findings of fact which appear in the proceedings. The tenth finding was that "Said accident arose out of and in the course of his employment with the defenders." So clear was the Sheriff-Substitute that this was a finding in fact that he declined to state a case for the opinion of the Court of Session, because no question of law was raised upon which an appeal could be made. While it might, no doubt, have saved expense if the Sheriff-Substitute had simply stated a case for appeal, the course which he took seems to have been justified by the authority of *Henderson* v. *The Corporation of Glasgow*, reported in 2 Fraser, 1127, in which the Court, including the late Lord President Kinross, distinctly approves of a declinature on the ground that the question put is, "Whether the accident was one arising out of and in the course of Henderson's employment, and the Sheriff declined to state it because he considered that it was one of fact and not of law." In my opinion the present case was not distinguishable from *Henderson's* in principle. I cannot agree with the learned Judges of the Second Division that it is so distinguishable.

The case, however, after an intimation of

opinion in a contrary sense by the Second Division, was, by a very proper arrangement between the parties, taken as having been stated with a substituted finding for that above quoted. The new finding reads —"Having found in fact in terms of the foregoing findings, I have further found that the accident arose out of and in the course of the employment of the deceased with the defenders;" and it was agreed that the question of law should be stated for the Court thus—"On the facts so admitted or proved, was the Sheriff-Substitute right in holding that the deceased man was killed by an accident arising out of and in the course of his employment with the appellants in the sense of the Workmen's Compensation Act 1906, section 1, sub-section 1?"

There is some difficulty even with this amendment in doing, what apparently we are required to do, viz., considering whether there is any question of law raised in this case. I can perfectly understand that the point whether the accident arose out of and in the course of a person's employment may be either (1) a question of fact, (2) in the more general case an inference in fact, or (3) in the case—much rarer in ordinary practice — an inference either of law or of mixed law and fact. It is in the last-mentioned case alone that an appeal on stated case would be competent.

I desire to adopt in terms the language of Lord Kinnear in the case of *Henderson* —"As to the last point, whether the accident arose out of and in the course of his employment, I think the Sheriff is quite right in saying that it is only a question of fact if he has treated it as a question of fact. It has occurred in several cases which have come before us that questions of law have been stated in terms of fact, and in those cases, if we had looked at nothing but the exact words of the question of law, we might have been obliged to say 'There is nothing for us to consider.' But then it sometimes appears that the Sheriff or arbiter has come to his conclusion of fact upon a ground of law, because he has considered himself constrained by a construction of the statute, or by some rule which he supposed to be a rule of law, to adopt a certain construction of the facts, and in a case of that kind it is quite right and necessary that this Court should entertain an appeal. It has been sometimes said that the question in that kind of case is raised in very much the same way as if we were asked to consider a hypothetical charge given by the Sheriff as judge to himself as a jury, and to find that he had given himself a wrong direction. But then that kind of question never can arise when the Sheriff says in so many words—'I think this is a question of fact, and I decide it upon the facts; I have not proceeded upon law at all'; and that is what the Sheriff says in this case."

That was also what the Sheriff-Substitute said in the present case, and in my opinion he rightly said so. I may add that I agree with the Second Division in deprecating any attempted exclusion of the function of a Court of Appeal by refusing to state a real question of law. In that there would be a danger of usurpation. Yet there is, of course, also a danger of usurpation on the other side, as, for instance, should Courts of Appeal usurp the arbitrament on fact which the Legislature has placed exclusively elsewhere. Taking it, however, that the amended tenth finding in the present case stands as one which it is competent for the Court to consider, I think that the question is,—Has some legal error in the mind of the Sheriff-Substitute caused him so to misdirect himself as to lead him to a wrong inference upon the facts found by him?

As has been so clearly pointed out in the judgment of my noble and learned friend Lord Atkinson, the scene of duty of the deceased workman was the Granton quay and each of the four trawlers moored near it, and the performance of his duty included in point of fact his movements from the boat or boats to the shore and *vice versâ*. The Lord Justice-Clerk's judgment appears to rest upon an inference that this fatal accident occurred while the workman was absent from the scene of his duty. He remarks—"The essential part of his duty was to watch, and it was impossible that he could fulfil that duty by leaving his post and going to a public-house. The moment he left the subject which he was to watch he was no longer in the course of his employment." He further adds—"The moment he left he ceased to be in the course of his employment. When he was going back he was not in the course of his employment, because he had no right to be away."

Taking the facts, however, as I am bound to and very willingly do, from the findings of the Sheriff-Substitute, it appears that while this workman, engaged for a continuous spell of 25 hours, had no doubt been absent from the harbour "a short distance," "for a very short time," he had actually, before the accident occurred, returned to the quay, viz., to the scene of his employment, and he was in the act of proceeding from the quay to one of the trawlers. The case, however, has been treated as if some deviation, with results analogous to those known in shipping law, had taken place, which involved some impairment of right after the deviation had ceased. I cannot hold that this is sound. The case is, in my opinion, completely distinguishable from *Reed* v. *The Great Western Railway Company*, 1909, A.C. 31, and *Macdonald* v. *Owners of Steamship "Banana,"* 2 K.B. (1908) 926, where the accident took place while the workman was absent from the scene of his duty. It seems to me to be within the principle of *Robertson* v. *Allan Brothers & Company*, 98 L.T. 821—a case which, in my opinion, was rightly decided, and the authority of which was recognised in *Moore* v. *Manchester Liners, Limited*, 1 K.B. (1909) 417.

I am of opinion that the finding and award of the Sheriff-Substitute should stand, these not having been grounded on any error in law.

Their Lordships reversed, with expenses, the judgment appealed from.

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COURT OF SESSION.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GLASGOW NAVIGATION COMPANY, LIMITED *v.* IRON ORE COMPANY, LIMITED.

Ship—Charter-Party—Demurrage—Exceptions—"Stoppage on Railway"—"Cause beyond Personal Control of Charterers or Agents"—Delay Owing to Block of Railway Waggons in Consignee's Works—Liability of Charterer.

A charter-party, under which a cargo of iron ore was carried from Bilbao to Ayr to be delivered there as customary, provided that demurrage should not accrue if the discharging were prevented by all or any of the following causes:—" . . . Stoppage on railway or river or canal. Time lost by any cause, of what nature or kind soever, beyond the personal control of the charterers or their agents." The vessel was detained on demurrage at Ayr for 79 hours. In an action by the shipowners against the charterers it was proved that the customary mode of discharging iron ore at the Port of Ayr was direct from the vessel's hold into trucks supplied by the railway company; that the railway company, though there was no scarcity of waggons and though they were willing to supply them, did not do so, because the consignees already had their works blocked with railway waggons containing iron ore which had been discharged from other vessels arriving about the same time, and could receive no more waggons till the block was cleared; that the consignees were purchasers of the cargo from the defenders, but did not represent them as their agents or otherwise in the discharge of the cargo; that the defenders, through their agents, did everything in their power to facilitate the discharge.

Held that the delay in discharging was not due to "stoppage on railway," —*Letricheux & David* v. *Dunlop & Company*, December 1, 1891, 19 R. 209, 29 S.L.R. 182, and *Mein* v. *Othman*, December 11, 1903, 6 F. 276, 41 S.L.R. 144, *distinguished*—but that it was due to a cause "beyond the personal control of the charterers or their agents," and that the defenders were therefore exempted from liability by the terms of the charter-party.

The Glasgow Navigation Company, Limited, raised an action in the Sheriff Court at Glasgow against the Iron Ore Company, Limited, concluding for £95, 16s. 8d. as demurrage in respect of delay in the discharge of the pursuers' steamer "Maroon," which the defenders had chartered to carry from Bilbao to Ayr a cargo of iron ore to be discharged there as customary.

The charter-party provided that—"Time lost by reason of all or any of the following causes shall not be computed as part of the aforesaid running days, neither shall demurrage accrue if the loading or discharging be wholly or partially prevented or delayed thereby—' . . . stoppage on railway or river or canal. Time lost by any cause, of what nature or kind soever, whether of the character enumerated or not, beyond the personal control of the charterers or their agents, whereby they may be prevented or delayed in supplying, loading, or discharging.'"

Proof was allowed and led, and on 3rd August 1908 the Sheriff-Substitute (FYFE) pronounced the following interlocutor:—"Finds (1) that pursuers are the owners of the steamship 'Maroon' of Glasgow; (2) that by charter-party, dated 9th July 1907, the defenders chartered this vessel to carry from Bilbao to Ayr a cargo of iron ore, to be delivered there as customary—time lost by causes beyond the personal control of the charterers or their agents whereby the discharge might be delayed being, *inter alia*, excepted; (3) that the customary mode of discharging iron ore at the port of Ayr is direct from the vessel's hold into trucks provided by the railway company; (4) that the vessel carried a cargo of 1902 tons of iron ore; (5) that she arrived at Ayr on 22nd July 1907 at 6 a.m.; (6) that in terms of the charter-party the discharging time did not begin to run till the vessel had been berthed and ready for discharge; (7) that the discharging time commenced at 10 a.m. on 22nd July; (8) that in normal circumstances, provided a reasonable supply of trucks had been provided, the cargo would have been completely discharged by midnight of 24th July; (9) that the vessel was not discharged until 7 p.m. on 29th July; (10) that the reason why the discharge was thus delayed was that the railway company did not supply trucks; (11) that the reason why the trucks were not supplied was that the Dalmellington Iron Company, Limited, who were the consignees of the cargo, already had their works blocked with railway waggons containing iron ore, which had been discharged from vessels which had arrived at Ayr about the same time as the 'Maroon'; (12) that the total working time the 'Maroon' was detained at the discharging berth was 177 hours; (13) that the time reasonably necessary for her discharge, and all that would have been occupied had the supply