If, on the other hand, you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are dicta of Lord President Inglis which seem to point completely the other way. Of course that would not prevent the matter being dealt with in the United Kingdom by means of positive enactment. I need say no more as to that, because I entirely concur with what fell from the Lord Chancellor as to the true meaning of sections 117 and 118.

Appeal dismissed.

Counsel for Appellant—Radcliffe, K.C.—H. Dobb. Agents—Heath & Hamilton, Solicitors.

Counsel for Respondents — Rawlinson, K.C.—W. M. R. Pringle. Agent—Julius A. White, Solicitor.

HOUSE OF LORDS.

Monday, July 11, 1910.

(Before the Lord Chancellor (Loreburn), Lords James of Hereford, Atkinson, Shaw, and Mersey.)

MARSHALL *v.* OWNERS OF S.S. "WILD ROSE."

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

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

While a ship was in harbour a seaman employed on board left his berth and went on deck during a hot night, saying that he was going up for fresh air. Next day his drowned body was found in the water just underneath a part of the ship's rail where the crew habitually sat. There was no further evidence to explain the drowning.

Held (*diss.* the Lord Chancellor and Lord James of Hereford) that, assuming the death had occurred by accident, there was not evidence to support the inference that the accident arose out of the employment.

A seaman was drowned under circumstances stated in their Lordships' judgments. His widow claimed compensation from his employers and was awarded £300 by the County Court Judge, who found upon the facts that the seaman had died from an accident "arising out of and in the course of his employment." This award was set aside by the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.).

The widow appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—This has been to me an anxious case, because of the view adopted by the Court of Appeal, from which I am always slow to differ, though I think that Fletcher Moulton, L.J., had some doubts. It involves two quite distinct questions. The first is, Does the evidence warrant the conclusion of fact reached by the County Court Judge—that this unfortunate man fell into the water by accident? The second is, whether, if that be so, the accident was one "arising out of the employment of the deceased." I wish to avoid confusion between those two separate points. In regard to the first of these questions, I observe that in none of the opinions delivered in the Court of Appeal is the conclusion of the learned County Court Judge controverted, though it was assailed in argument at the Bar of this House. We know, on the evidence, that on the evening of the 27th May the "Wild Rose" was in Aberdeen Harbour. At 10·10 p.m. Marshall came on board, went below, and took of all his clothes except his trousers, shirt, and socks. It was a very hot night. He subsequently came out of his berth, saying that he thought that he would go on deck for fresh air. The crew always sat on the starboard quarter against the fishboard. Marshall went on deck with his trousers, shirt, and socks on. At midnight he was not on deck. His body was searched for next morning and found just underneath where the crew usually sat. Beyond this we know nothing. Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act, he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved. I cannot possibly say that the County Court Judge was wrong, because I also conclude from the slight material before us that this man fell into the water by accident (suicide was not ever suggested) and so was drowned, and I do not believe that any jury would hesitate in saying so. Whether he was sitting on the rail or not I cannot conclude, and it is wholly immaterial. But that he fell off the ship by accident I do not really doubt. The second question is more difficult. Did this accident arise out of Marshall's employment? Let me see what his employment was. The respondents' case tells us that he was second engineer on the "Wild Rose," a steam trawler. In that capacity he had to serve continuously. Sometimes he would be actually minding

the engines. Sometimes he would be off duty, in the sense of active duty. But he was in service all the time. His employment was to discharge the duties of second engineer as and when they arose, and among others, to be on the ship. In the opinion of Farwell, L.J., occurs a passage as follows, which brings the matter admirably to a point—"If an ordinary sailor is a member of a watch, and is on duty during the night and disappears, I should think that the inference would be irresistible that he died from an accident arising out of his employment; but if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any court could draw the inference that he died from an accident arising out of the employment." Now I am not able to take that distinction. The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have, first, to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident it equally arose out of his employment, whether it occurred during that part of the voyage when he was actually working, or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship, and if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I think that the accident arises out of the employment. In saying this I am anxious not to give countenance to the idea that whenever an accident occurs to a person who is continuously employed it must be taken to have arisen out of the employment. If a seaman had his eye injured, for example, by a comrade striking a match to light his pipe, it could not come within the Act. But I think that it is within the Act when the danger is one of those incidental to the employment. In the present case the arbitrator has so found, and I think that he was entitled so to find.

LORD JAMES OF HEREFORD—I am of the same opinion. I think that it may be taken that there was a recognised habit, prompted by convenience, for the men when resting to sit on the rail, and that no objection was taken to their so doing by anyone in authority. If this be so, the argument that Marshall might be regarded as if he had been sitting on the end of the bowsprit cannot be maintained. It was not usual, or reasonable, or authorised that a man should sit on the end of the bowsprit. It is an admitted fact that the deceased man was in the employment of the defendants, and that in pursuance of that employment he was on board the ship on the night of his death. Being there he was not departing from that employment if he sought the better air of the deck rather than remain in the closer atmosphere of the cabin. Having reached the deck it was reasonable that he should sit down and not remain standing. It was also reasonable to expect that he would sit upon the rail rather than upon the bare deck. In order to carry out his employment he was resting, and when he was resting the accident happened. But it remains to be determined, Did the death of the deceased arise out of his employment? I think that it did. Now what do the words "arising out of the employment" mean? They are vague words, very different in their effect from such words as "caused by the employment." This seems to point to an indirect connection with the employment, and I think that they are fulfilled if the accident occurred during the employment and under circumstances which show that the injured person had not at the time of the injury departed from the controlling incidents of the employment. It may be that independent circumstances may show that an accident occurring during the employment did not arise out of it, but if the conditions which I have mentioned are fulfilled, the burthen of establishing such circumstances must be borne by the employer. The words of the statute, "arising out of the employment," are, as I have said, somewhat vague, but I read them as I think they ought to be read, liberally, and doing so it seems to me that the facts of this case establish a right to compensation, and that therefore the appeal should be allowed.

LORD ATKINSON—In this case the Court of Appeal have held that the applicant has not discharged the burden of proof which lay upon her by showing that her husband met his death by an accident arising out of and in the course of his employment. In my opinion they were right. The finding of the learned County Court Judge, to paraphrase the language of Lord Watson in *Wakelin* v. *London and South-Western Railway Company* (12 A.C. 41), was not, I think, an inference which could be reasonably drawn as a matter of fact, because there were no data from which such an inference could be drawn, so much as a conjecture or surmise, which there were no doubt ample materials to justify. There is nothing to show that Marshall did not deliberately jump or throw himself into the water, beyond the greater probability of accident as compared with suicide. No evidence whatever was adduced to show what the structure of the trawler was—whether her bulwarks were so low that he might readily have fallen over them, or so high that he could not have fallen over them. Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the

deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew or some of them usually sat, it is assumed, apparently, that he was sitting in that place, and in some way or other fell in from there. Whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found. The argument urged in support of this appeal appeared to me to resolve itself into something like this. A seaman lives on his ship. It is one of the duties of his employment to do so. Whether he works at his proper work, or sleeps or rests, sits or stands or moves about, the relation of master and servant continues to exist between him and his employer, and there he does each and all of these things in the course of his employment. If, therefore, he sustains a personal injury while on board his ship in some unexplained and unknown way, it must be assumed that the injury was caused by an accident arising out of and in the course of his employment. He may by his own carelessness or thoughtlessness or wilful misconduct have exposed himself to a new danger, not at all incidental to the doing in a reasonable way of any of the things which he is by the express or implied terms of his employment bound or privileged to do, such, for instance, as by dozing to sleep at night on the bulwarks of his vessel instead of in his bunk to prepare for work next day, yet though this new danger be the cause of the accident by which he is injured, it must still be presumed to be an accident arising not only in the course of his employment, but, in addition, out of and in the course of his employment. Sir Robert Finlay, in illustration of his argument, took the case of a female domestic servant who was obliged to live in her master's house, as the seaman is obliged to live on his ship, and assumed that she was seen to enter her bedroom some hot and sultry night, and next morning the window of her room was found open and her lifeless body found on the pavement beneath. She might have thrown herself out, or dozed asleep and fallen out, or overbalanced herself while awake and fallen out. On the principle for which the appellant contends it should be presumed she was killed by an accident arising out of and in the course of her employment, because in the course of her employment she was undoubtedly entitled to rest and to breathe fresh air; but it does not appear to me to be either a reasonable, ordinary, or proper way of resting or taking fresh air to lean out of a window at night at a time when sleep may readily overtake her. It could not be assumed that she or her master ever contemplated such a risk as attendant upon her service when she entered upon it. The peril to her was, I think, a new peril arising out of her own careless and reckless act, and not a peril incident to, or connected with, the performance of the duties of her employment, or the enjoyment, in a reasonable and proper way, of those rights and privileges to which she might be entitled as preparations for her active work. The accident caused by that new peril could not, in such a case, I think, be held to arise out of her employment. The only difference between that case and the present lies in the fact that this seat was said to be an accustomed seat; but does that make any real difference? A workman may be bound or entitled to frequent a certain place, or do a certain thing, under certain conditions, and if an accident happened to him while frequenting that place or doing that thing, under these conditions, it might well be held that that accident arose out of his employment, but it by no means follows that the same result would be arrived at if the conditions were entirely changed before he did the particular thing or frequented the particular place. The alteration in the conditions may have made that perilous which was theretofore safe, so perilous indeed, that in the absence of actual proof it could not be presumed that the employer or workman ever contracted or contemplated that the peril should or might be encountered as one of the risks connected with the employment. Even, therefore, if this seat on the bulwarks, near the fishboard, was one which the crew, with the express or implied permission of the master of the ship, used in their waking moments, so as to cause an accident arising from its use at such times to be rightly held to have arisen out of the employment, it by no means follows that the use of the same seat for sleeping on at night was ever contemplated by the parties as a risk incident to the employment. Even, therefore, if it had been proved, which it was not, that the deceased when he left his bunk sat upon this seat, then, having regard to the time at and circumstances under which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incidental to or connected with his employment while his ship was in port, and at such a time and under such circumstances, or his drowning an accident arising out of his employment, though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk. One cannot help feeling sympathy for the applicant, but if any force is to be given to the words of the statute, she must, in my opinion, be held to have failed to discharge the burden of proof resting upon her.

LORD SHAW — In this case the known facts are few and simple. A sailor, partially dressed, left his sleeping berth in a ship lying in a tidal basin, and proceeded to the deck, having remarked to his companion that he was going up to cool himself. This happened at 10·10 on the night of the 27th May 1908. Next day his dead body was found in the harbour, just under the fishboard, which was at a part of the gunwale where the members of the crew

sometimes sat down. From these, which are the only facts proved, the County Court Judge inferred that the deceased met his death by accident arising out of and in the course of his employment, and he found the shipowners liable in compensation under the Act of 1906. The learned Judges of the Court of Appeal have found that it is not established that the death occurred by accident arising out of and in the course of his employment. They appear to concede, or are willing to take it for granted, that the death occurred by accident, and that the accident may be looked upon as having occurred in the course of the employment, but recognising that they are bound also, before liability can emerge under the Act, to hold that the accident arose out of the employment, they cannot do so, and they decide accordingly. I feel constrained to agree with their conclusion. It has been reached after great concessions or assumptions in favour of the appellant, and on those, in my opinion, it has been properly reached. But, for my own part, I do not conceal that I should have some difficulty in making those concessions or assumptions. The facts in every case may leave here and there a hiatus which only inference can fill. But in the present case the name of inference may be apt to be given to what is pure conjecture. What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One can infer nothing; all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment, or as was justly argued, in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it? There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture. Finally, if mere conjecture be legitimate, how can it reach the point that an accident causing the death by drowning of this man occurred not merely in the course of his employment but arose out of that employment? The answer to this is that he was a sailor on his ship and the ship was surrounded by water. Had the ship been at sea one could have understood the answer better, because the sailor might have been pitched overboard by the rolling of the vessel or blown overboard by the wind. These would have been the perils surrounding the seaman's life and duty, and injuries or accidents through them might well enough be held to fall within the category of things arising out of and in the course of the employment. But in the present case such a question does not arise, for the ship was lying quietly in port. The deceased man left his sleeping berth and went on deck; and the nearest conjecture to an inference that was placed before this House was that he had seated himself on the side of the ship and fallen asleep and overboard. No one would attribute misconduct to him in selecting that place, or even the rigging to rest upon during the night rather than in his berth, and, of course, it is argued that since he was under engagement and doing no wrong the accident to him arose in the course of his employment. But how it can be said to have arisen out of it I do not understand. It arose out of some voluntary act of the deceased, in no way springing from his employment, necessary to his employment, or usual in his employment. This being so, How is the Act of Parliament to be construed? To keep to the case of death alone. The statute provides that, "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 respect of the workman's death. I do not see my way to hold that this is equivalent to saying that the employer is liable to pay compensation in respect of the death of any workman should the death occur during the period and at the place of his service. To do so would, in my opinion, be to interpret language setting up definite conditions and canons of liability as if it were really a life insurance. It is settled law that a claimant in invoking the statute must establish that the conditions and canons of liability which it sets up have been satisfied. But the interpretation argued for by the appellant would wipe those conditions and canons out. I desire, however, specifically to guard my opinion as being any precedent in what I may call the ordinary case of a sailor, whose life is sacrificed in circumstances of mystery — say, of loneliness during a night watch or confusion during a storm. The performance of duty in such circumstances would raise presumptions of a kind consistent with the seaman's case completely satisfying the conditions laid down by the Act. I think that the view expressed on that subject in the latter part of the judgment of Farwell, L.J., is both humane and sound. The present case, however, I hold, for the reasons above expressed, to be of a totally different character. I agree with the opinion that the appeal should be dismissed.

LORD MERSEY—For the purpose of dealing with this appeal I accept the statement of facts in the appellant's case. It is not necessary to recapitulate them. The only question to be determined is whether these facts afford any evidence upon which the County Court Judge could reasonably find that the death of Marshall was caused by accident arising out of his employment. The Court of Appeal were of opinion that they afforded no such evidence, and I think that their decision was right. It is said that the accident was due to the man's sitting on the rail of the ship and falling from it. I think that this is probably true, although I fail to find any legal evidence in support of the statement. But I do not see how it can reasonably be said that to sit on the rail of the ship was in any sense connected with the man's employment.

I agree with Sir Robert Finlay that it would be as reasonable to say that to sit on the end of the bowsprit would be an act connected with his employment, and if sitting on the rail was no part of his employment, falling from it cannot be an accident arising out of his employment. I do not overlook the statement in the case that the engineers were in the habit of sitting on this rail. I can well believe it to be true. But that the men were in the habit of doing a thing which was not an incident of their employment cannot, in my view, bring any resulting accident within the meaning of the Act. I do not regard this case as laying down any general principle. It turns entirely on its particular facts, and taking the view that I do of those facts I think that the appeal fails.

Appeal dismissed.

Counsel for Appellant—Scott Fox, K.C. —Lowenthal. Agents—Maples, Teesdale, & Co., Solicitors.

Counsel for Respondents — Sir R. B. Finlay, K.C. — Atkin, K.C. — Mundahl. Agents—Williamson, Hill, & Co., Solicitors.

PRIVY COUNCIL.

Friday, July 15, 1910.

(*Present*—The Right Hons. Lords Macnaghten, Atkinson, Shaw, and Mersey.)

THOMPSON *v.* EQUITY FIRE INSURANCE COMPANY.

(ON APPEAL FROM THE SUPREME COURT OF CANADA.)

Insurance—Fire Insurance Policy—Exception from Liability—Gasoline "Stored or Kept in the Building Insured"—Construction.

A condition was by operation of statute incorporated in a policy of fire insurance, providing that "the company is not liable for loss or damage occurring while gasoline is stored or kept in the building insured." A gasoline cooking stove containing about a pint of gasoline was kept upon the premises, and the building was burnt down by a fire which in point of fact was caused by the gasoline stove.

Held that gasoline was not "stored or kept" in the meaning of the condition, and that the Insurance Company were not exempted from liability.

In an action upon a policy of fire insurance, the Insurance Company denied liability in reliance upon a clause of exemption quoted *supra* in rubric, and judgment was pronounced in their favour by the Supreme Court of Canada. The policy holder appealed.

The circumstances are stated fully in the considered judgment of their Lordships, which was delivered by

LORD MACNAGHTEN—The appellant J. C. Thompson was the owner of a building in New Liskeard, Ontario, which was insured against fire with the respondents, the Equity Fire Insurance Company. On the 4th September 1906 the building was burnt down. A claim was made under the policy. It was resisted on various grounds, which have all been disposed of but one. The only question remaining is whether the policy was avoided by reason of the presence on the premises at the time of the fire of a small quantity of gasoline. The statutory condition on which the Insurance Company relies declares that "The Company is not liable . . . for loss or damage occurring while . . . gasoline . . . is . . . stored or kept in the building insured." The facts of the case are not in dispute. The lower part of the building was used by Thompson as a drug store and furniture shop. He had an assistant named Post, a qualified chemist and druggist. Post and his family occupied the upper part of the building as a dwelling-house. In June 1906 Post procured a gasoline stove for cooking purposes. He used it for a short time and then put it by with the gasoline which happened to be in it. On the day of the fire some syrups were wanted in a hurry. The man who usually made them and always made them by what is called the cold process was absent. Post bethought him of this disused stove, brought it downstairs with the gasoline in it, and lighted it in a room behind the shop in order to make the syrups which he required, by the more rapid process of boiling. And then in some way which is not ascertained—for the stove was in the back room and Post was in the shop at the moment—the fire broke out suddenly. It was caused, no doubt, by this gasoline stove. The question is, Did the loss occur while gasoline was "stored or kept" in the building? It is common ground that there was no gasoline in the building but that which was in the stove, and it seems that the quantity of gasoline was about a pint. What is the meaning of the words "stored or kept" in collocation and in the connection in which they are found? They are common English words with no very precise or exact signification. They have a somewhat kindred meaning and cover very much the same ground. The expression as used in the statutory condition seems to point to the presence of a quantity not inconsiderable or at any rate not trifling in amount, and to import a notion of warehousing or depositing for safe custody or keeping in stock for trading purposes. It is difficult, if not impossible, to give an accurate definition of the meaning, but if one takes a concrete case it is not very difficult to say whether a particular thing is "stored or kept" within the meaning of the condition. No one probably would say that a person who had a reasonable quantity of tea in his house for domestic use was "storing or keeping" tea there, or (to take the instance