out of the fees of the defender as trustee appears to me to be an unfortunate condition, but I have not been able to satisfy myself that it is corrupt or of such a character as to justify me in sustaining the defender's plea to the effect of wholly disregarding the agreement between the parties." In the view that I take it is much more than an unfortunate condition; it is a condition expressly contrary to that equality of honest distribution of the estate which ought to prevail in all bargains with respect to trusteeships of sequestrated estates in Scotland.

But Mr Holman Gregory said, and said with much force, that this occurs only in one clause of the contract, and the action is a general one for count and reckoning and may apply to a series of circumstances in which it did not operate. Most unhappily for such an argument the language of the condescendence of the pursuers makes this unavailing. I find on a perusal of this record that the broad proposition radically affecting the finance of the matter and the claims of the appellants occurs in condescendence 5, where there is a reference to an unpaid balance of £168 due from the estate of a Mr John Fairweather. With regard to that unpaid balance the scheme of the present count and reckoning is this, that that unpaid balance, in the language of condescendence 5, "falls to be first paid to the pursuers out of the sums pooled in terms of said article fifth," that is to say, it falls to be paid out of the trustee's own remuneration.

I do not think Mr Wilton in drawing these pleadings was erroneous when he stated that "such a transaction if carried out would be a fraud upon the other creditors who accepted their dividends in the belief that all the creditors, including the pursuers, were receiving equality of treatment from the defender as trustee." I think that is a sound proposition; it is in accordance with the equitable distribution of assets under the law of Scotland. (I may say in passing that I have not heard anything in the argument to suggest to me that any different rule from that prevailing north of the Tweed prevails to the south of it.)

But if that be so it is conclusive of the case, and therefore I repeat my surprise that when this proposition so broadly stated upon this record reached the Second Division of the Court of Session it should not have been dealt with at all by any of the judgments, but that, on the contrary, these judgments proceeded upon grounds to which I feel myself constrained to say that I must decline assent. I agree with the conclusion at which your Lordships have arrived.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuers (Appellants)—Sandeman, K.C.—Holman Gregory, K.C.—William Mitchel. Agents—Tait & Crichton, W.S., Edinburgh—Helder, Roberts, Walton, & Giles, London.

Counsel for the Defender (Respondent)—Younger, K.C.—Wilton. Agents—John C. Brodie & Sons, W.S., Edinburgh—Grahames, Currey, & Spens, London.

Friday, July 17.

(Before Earl Loreburn, Lords Dunedin, Atkinson, Shaw, and Parmoor.)

AYR STEAM SHIPPING COMPANY, LIMITED *v.* LENDRUM.

(In the Court of Session, December 5, 1912, 50 S.L.R. 173, and 1913 S.C. 331.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising Out of and in the Course of the Employment*"—*Onus of Proof*—*Unexplained Drowning of Ship's Steward.*

Circumstances in which *held* (*diss.* Lords Dunedin and Atkinson, and *rev.* judgment of the Second Division) that an award of compensation by an arbiter in a workmen's compensation case, where the workman, a ship's steward, was last seen alive in his bunk, and was found drowned next day near where his ship had been lying, should be sustained, inasmuch as a reasonable man might have drawn the inference that his death resulted from an accident arising out of and in the course of his employment.

Master and Servant—Workmen's Compensation Acts—Process—Stated Case—Remit.

Per Earl Loreburn, in a case under the Workmen's Compensation Act 1906—"Where a case is stated incompletely or ambiguously a court may remit for further information. . . . A remit is not intended to assist the court in substituting itself for the arbiter."

This case is reported *ante ut supra.*

The applicants Mrs Lendrum and her son appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—In this case the arbiter found that the applicants came within the statute and awarded compensation accordingly. The Court of Session set aside the award, and the question before your Lordships is simply this, Was the conclusion of the arbiter such as a reasonable man could reach? In the case of *Mackinnon* v. *Miller* (46 S.L.R. 299) Lord Dunedin laid down that principle, and it is now quite ascertained. Any of us may think that we can see the truth better than the arbiter. Perhaps we may be right, perhaps we may be wrong. It is, however, no business of ours. We have no jurisdiction to decide the question of fact as we think right. Our jurisdiction is confined to the more modest duty already described.

The deceased was steward on a ship lying in harbour. He was lying in his bunk. The captain told him to get tea ready for the men. The next thing known is that he disappeared, and was found some time later drowned in the sea. He was sober. He was subject to nausea. The bulwarks were 3 feet 5 inches above the deck. These are to my mind the material facts found by the arbiter in the case stated.

This class of case has led to much refine-

ment. I do not find it very profitable to consider whether the arbiter's award proceeded on inference or on some kind of speculation which was described in argument by four words successively, namely, conjecture, probability, guess, or surmise. I am not qualified, and I do not know anyone who is qualified, to draw a precise line between the thoughts suggested by these several words. They seem to me to run into one another. Nor can I define wherein any of them differ from the inference.

Nor am I impressed by arguments proceeding upon a comparison between the facts of one case and the facts of another. Precedents are valuable and authoritative when they lay down a principle. They are otherwise merely illustrations of the way in which judges look at facts. Unfortunately judges are human like other people, and different judges look at facts differently. Nothing has struck me more than this circumstance. When the question is whether or not an arbiter, as a reasonable man, could arrive at a particular conclusion, I find that in some instances courts have held that he could not, while some of the judges have actually agreed in the conclusion. That is my position to-day. I hope I am a reasonable man, but if I had been the arbiter I should, on the facts that he has found, have come to exactly the same conclusion. I think the moral is that we should regard these awards in a very broad way, and constantly remember that we are not the tribunal to decide. I shall always be slow to say that no reasonable person could think differently from myself.

This man was in his bed, and a few minutes afterwards he was in the water. Murder is negatived; suicide is negatived. He was on the ship, a place of some danger if you are careless, in pursuance of his duty. It was not found that he had withdrawn himself from his duty. I really do not know whether he fell overboard because he was trying to vomit over the ship's side. I think he must have fallen over by accident while on board as his duty required. But my opinion is not the point. The point is that the arbiter took that view, and though I could understand his taking a different view I think there was evidence which justified him in inferring that the man died by accident arising out of his employment. It surely cannot be necessary to show either the particular way in which he fell or the particular thing he was doing when he fell. An applicant has to prove his case, but he is not required to demonstrate his case or to exclude by evidence every possibility that may be suggested.

Accordingly I think this appeal should be allowed. I desire to add a few words about the remit. Where a case is stated incompletely or ambiguously a court may remit for further information. But I think that here the remit went beyond that. Among other things it asked some questions which must have been suggested at the Bar from perusal of the evidence, the answers to which would not affect the question whether or not there was sufficient evidence to support the award. A remit is not intended to assist the Court in substituting itself for the arbiter.

LORD ATKINSON—I regret that with every disposition to come to the same conclusion as my noble and learned friends, I have been unable to do so. I concur, however, on the question of remit. I think that cases should be remitted where the findings of the arbitrator are incomplete and ambiguous or obscure. Since the Superior Court cannot look at the evidence, it is necessary that the findings on important facts should be clear and precise, and if they are neither clear nor precise it is, I think, the privilege and the duty of the Court before which they come to remit the case to the arbitrator in order that he may make complete what was incomplete and plain what was obscure.

Now I concur that in this case the remit was directed to matters that were really not relevant or bearing upon the important facts.

In this case the widow of Edward Lendrum deceased, and Edward Lendrum her son, sued the respondents under the Workmen's Compensation Act of 1906 to recover compensation in respect of the death on the 16th December 1911 of the deceased, alleged to have been caused by an accident arising out of and in the course of his employment as a steward in a ship of the appellant company's named the "Turnberry." The arbitrator, the Sheriff-Substitute, has found in favour of the applicants' claim—(1) that the deceased met his death by an accident arising out of his employment, and (2) that he met with this accident in the course of his employment; and the question of law put by the arbitrator in the Special Case stated for the opinion of the Second Division is, to use his own language, whether on the facts admitted and proved he was justified in so finding. By the word "justified" he must on the authorities be held, I think, to have meant whether upon the evidence in the case his findings on these two points were conclusions which as a reasonable man he might in good faith have arrived at. It is not disputed that the employment of the deceased was a continuous employment, as distinguished from an intermittent employment. In my view, however, that consideration is wholly immaterial. Whether a workman's employment be continuous or intermittent, those claiming compensation in respect of his death are bound to prove that the death resulted from an injury by accident arising out of and in the course of the workman's employment. That burden of proof is as heavy in the one case as in the other, and it must be discharged by the same means and according to the same rules of evidence in the one case as in the other. It is not, I think, legitimate in the case of a continuous employment, any more than it would be in the case of an intermittent employment, if suicide and external violence be negatived, as it was said, to assume that an unexplained accident, as it has been styled, arose out of the workman's employment. By an unexplained accident in this connection I mean an accident as to which the evidence does not show how it occurred,

or which shows with equal cogency that it may have occurred in two or more distinct and different ways, or be the result of two or more distinct and different causes.

I think the case of *Wakelin* v. *The London and South-Western Railway Company*, which has been so often referred to (12 Appeal Cases 411), decided by Lords Halsbury, Watson, Blackburn, and Fitzgerald, has a bearing upon this case. There the action was brought against the Railway Company for so negligently and unskilfully driving their train across a certain level-crossing, and so neglecting to take precautions in respect of the train at the level-crossing, that the train struck and killed the plaintiff's husband, whose dead body was found near the level-crossing in a condition which showed that he was struck by the passing train. The jury found a verdict for the plaintiff. It was necessary for the plaintiff to show that the company were guilty of negligence which caused her husband's death. It was assumed for the purpose of the decision that the company had been guilty of negligence in not whistling as the train approached the level-crossing, but it was held that there was no evidence to connect that negligence with the accident, that there was therefore no case to go to the jury, and that the company were not liable. Lord Halsbury, at page 45 of the report, is reported to have expressed himself thus—"In this case I am unable to see any evidence to show how this unfortunate calamity occurred. One may surmise—and it is but surmise and not evidence—that the unfortunate man was knocked down by a passing train while on the level-crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than the man ran against the train?" And Lord Watson, with whose judgment Lord Blackburn expressed his agreement at page 49 said—"The evidence appears to me to show that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine or train belonging to the respondents, and I am willing to assume, although I am by no means satisfied, that they, the company, were in certain respects negligent. The evidence goes no further. It affords ample material for conjecturing that the death may possibly have been occasioned by that negligence; but it furnishes no data from which an inference can reasonably be drawn that as a matter of fact it was so occasioned."

I feel that I follow a good example in using the language of those noble Lords. I think the principle of that judgment applies to the present case. In this case, as in that, the claimant (the plaintiff or plaintiffs) was or were bound to produce evidence furnishing data from which an inference could reasonably be drawn as a matter of fact that the particular fact or circumstances from which liability arose existed. In that case this fact was the existence of negligence causing the injury. In the present case the fact is that the accident arose out of and in course of her husband's employment. If the evidence be equally consistent with the accident arising out of and in the course of their employment, and not arising out of and in the course of his employment, the burden of proof which lay upon the plaintiffs has not been discharged. If there be no evidence to support the affirmative issue rather than the negative, the evidence in truth becomes perfectly neutral. And the conclusions of the arbitrator, however confidently and positively asserted to be findings of fact, are in truth mere guesses or surmises, which, with equal justification and plausibility, might have taken quite an opposite form.

Now I turn to the evidence. This vessel, the "Turnberry," was on the 16th December 1911 lying in the harbour of Larne. There is no evidence as to the state of the weather, or as to where or how the ship was moored, or whether she was motionless or to any extent labouring. A map of the ship was produced and proved, but beyond such evidence as this affords there is no evidence whatever as to the condition of the vessel's deck, whether it was slippery or encumbered, or dry and clear. From the map it appears that the rail of the bulwarks was 3 ft. 5 in. above the ship's deck, and it is found that the deceased man was 5 ft. 6 in. in stature. The deceased served the crew of the ship with breakfast in the usual way. The crew then rested. The ship was to sail at 6 p.m. on this day, and until shortly before that hour the deceased had no meal to prepare. It was customary for him to rest in the afternoon, especially on the afternoon of Saturday, as he would get little sleep on Friday night, when his work was heavy. From the map it appears that there is a deck-house on this vessel containing a saloon, an ill-ventilated room, containing the bunk in which the deceased slept, a pantry off this room, and a lavatory, which was the lavatory used by the deceased when on board. The room containing this bunk was entered directly from the saloon, and in going from it to the saloon the deceased would pass this lavatory. About four o'clock the captain of the ship went to the bunk of the deceased and told him to prepare tea for the crew before the ship sailed. Lendrum turned in his bunk, looked at the captain, but made no reply. The captain then saw that Lendrum had his waistcoat on, but could not tell whether he had his trousers or his coat on. Nor did he observe whether any of the clothes of the deceased were in the saloon. The captain, some time afterwards, sent the chief officer to see if Lendrum was preparing tea for the crew. This officer could not find him, and he and the captain went to search for him at about 5·30 p.m. and failed to find him, but they found, on a settee in the saloon, Lendrum's jacket, waistcoat, trousers, cap, necktie, collar, boots, purse and watch, the latter two of which were not in his clothes but on the settee beside his clothes. No underclothing was found. The body of the deceased, dressed in his underclothing, was found next day in the sea at a point between where the stern of the ship lay on the 16th of December and a certain neighbouring slip. It does not appear from the

evidence what was the distance between this slip and the berth of the steamer, or whether the harbour was tidal or not, or, if so, what was the set of the tide at any time between the finding of the body and the departure of the ship, or whether the action of the screw or the paddles of the steamer as she started would have had any effect upon the body. It was plain from the evidence that the deceased met his death by drowning. No marks of violence were found upon him. Evidence was given as to a strange occurrence which took place when this ship apparently was lying in the harbour of Ayr. The deceased was seen hanging over her side by a rope which was fastened to the taffrail and tied round his waist; that he was holding on by the rope with both his hands held over his head, but not in the water, and that he afterwards explained he did this to recover a towel which fell overboard. No date whatever is given for this occurrence, and no evidence as to whether any towel was seen overboard, or had fallen overboard, or what the man's condition or state of health was when this occurrence took place. The Sheriff-Substitute finds he was a good, temperate, sociable man, able to do his work and pleasant to deal with, and though not a teetotaller was never by his captain seen to be the worse for intoxicating liquor. He further finds that the deceased on this same night left his bunk, went on deck, and accidentally fell overboard and was drowned, and apparently that he did not commit suicide. If the learned Sheriff-Substitute meant by this latter finding that it was not proved that the deceased committed suicide, and that the presumption in the absence of such proof was against suicide, and he, relying on that presumption, found against suicide I think he was right, but if he meant that the evidence established affirmatively that his death was brought about by some cause other than suicide I think he was clearly wrong. I find in several cases the expression "suicide being negatived" is used as if the evidence justified the conclusion that it was affirmatively proved that the death was due to some circumstance other than suicide, and not the other, namely, that unless the presumption of crime be rebutted the Judge is justified in finding against suicide. I consider that is a most misleading expression. The evidence in this case, in my view, left the accident entirely unexplained, and, apart from this presumption against the commission of the crime of *felo de se*, was quite as consistent with suicide as with any other cause. An effort was made, however, to show how the deceased came to get into the water. It is stated in the case that the deceased "was subject to attacks of nausea and sickness, and was seen on previous occasions vomiting over the side of the ship." In the supplemental reports sent in by the Sheriff-Substitute in consequence of the remit I find the following passage—"The said plan accompanies this report and shows the half-rounds where Lendrum was seen vomiting on two occasions previous to his death." Whether this means that these were the only occasions when he was seen vomiting, or the only occasions on which he was seen vomiting at this particular place, is, like many other matters in this ill-drawn and loosely stated case, left in doubt, but there is no evidence whatever when and under what circumstances this vomiting took place, whether it was at sea or in harbour, in fair weather, or in foul, in a calm, or in a stormy sea, or what state of health the man was in at the time, or what he had eaten or drunk before the attack. There is not a particle of evidence that he was ill on the 16th of December 1911, or that he complained of being ill, or that to anybody who saw him he appeared to be ill. Two of the rails comprising the bulwarks are removed at these places called the half-rounds for the purpose apparently of facilitating the mooring of the vessel. It is possible, no doubt, that a man might, if he got on his hands and knees, crawl through these spaces, but it is not suggested that when on the two occasions Lendrum was seen vomiting near this place he assumed that attitude. No evidence was given as to whether this vessel was lighted up or not, whether anyone was about the deck or not, whether any cry for help was heard or not—everything is left vague and uncertain. No explanation is given or suggested as to why all the clothes, watch, &c., of the deceased were found in the saloon. No evidence to indicate whether he had commenced making the tea or not, but a conjecture is made that the deceased was attacked with nausea, rushed to the side of the ship to vomit, and fell over the bulwarks only thirteen inches lower than his own head. The only other suggestion is that he crawled through one of the open spaces I have mentioned. That conjecture, if it be a conjecture, remains the same, though it be styled by the Sheriff-Substitute an inference of fact.

In my view this case comes within the principle of *Wakelin's* case, and is distinguishable from *Swansea Vale* v. *Rice* (1912, A.C. 238), where an officer in a sick and giddy condition is sent to perform duties which would necessitate his being sometimes on the bridge of the ship and sometimes on the deck of the ship. I think it is also distinguishable from the case of *Mackinnon* v. *Miller* (1909 S.C. 373). There the deck of the ship was found to be greatly encumbered, the bulwarks were only 20 inches high, the passage along between those bulwarks and the engine-house was very narrow. The deck of the ship was in absolute darkness. The body of the deceased was found dressed in his ordinary sleeping clothes, his working clothes being laid beside his bunk. It would have been necessary for the deceased to have traversed this encumbered deck from the cabin where he slept to a fire hole forward used as a lavatory if he wanted to get to it for the purposes of nature, and if he tripped or made a false step the low bulwarks would have been more of a trap than a protection,

The rule as to the burden of proof may press hardly on some claims in cases such as these, as it does in other cases such as

Wakelin's, but if this law is to be altered to meet them, it should, I think, be done by legislation. I think the decision appealed from was therefore right and should be upheld, and this appeal dismissed with costs.

LORD SHAW—I agree with my noble and learned friend who has preceded me in reference to the point as to the remit made by the Court of Session in this case. A remit can only, in my opinion, properly be made when the material furnished in the statement of the case is such as to raise doubt and difficulty as to its completeness or its clearness. When I examine this remit I find in it two striking paragraphs referring to additional particulars and details of evidence which must have been mentioned at the Bar of the Court of Session; and the remit is made to the learned Judge to state as arbitrator whether these statements at the Bar as to little details of the facts were proved.

Anything of that sort appears to me to be a procedure accompanied with some danger. I admit that it is right, and, indeed, in some circumstances it would be the duty of the Court of Session to clear up an ambiguity on the line mentioned by my noble and learned friend who preceded me. But I look with much disrelish upon any procedure which would go further than that. Because observe to what consequences it would lead. If the employers' counsel makes the statement that certain items of fact ought to have been stated which might affect the mind of the Court, I presume that common justice would dictate that in every case the counsel for the workman might say the same thing, and you would have an interminable series of discussions as to whether the learned Judge, charged by the Legislature with the duty of stating a case had with meticulous completeness stated all the particular facts leading up to his conclusions. I could imagine a procedure of that kind to be productive of inconvenience, sometimes to be accompanied by a distortion of the balance of evidence and never very likely to show confidence in the arbitrator.

In regard to the merits of the case I much regret the difference of opinion in your Lordships' House. I should state my main proposition thus—That we in this House are not considering whether we would have come to the same conclusion upon the facts stated as that at which the learned arbitrator has arrived. Our duty is a very different, a strikingly different one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to a conclusion, which conclusion could not have been reached by a reasonable man. Had I been the arbitrator, had the noble Earl on the Woolsack been the arbitrator, had my noble and learned friend on my left (Lord Parmoor) been the arbitrator, we should each of us have reached the same conclusion as that reached by the arbitrator in this case. Had my noble and learned friends opposite (Lords Dunedin and Atkinson), either of them, been the arbitrator they would have reached an opposite conclusion. I let it be freely granted that we are all reasonable men, and I will also freely grant that as such each of us is willing to concede of the others that the conclusions which we respectively reach on the same facts although quite opposite conclusions are such in each case as may have been reached by a reasonable man. I ask myself what right have we to deny similar treatment, not in this case to each other, but to the arbitrator set up by the Legislature to determine the facts in the first instance? I could conceive of no circumstance more luminously favourable to the proposition that we are not here determining evidence for ourselves, but we are settling the main proposition, and that alone, whether the arbitrator appointed by the Legislature has reached a conclusion as to which we here, differing among ourselves, are able to affirm that he could not have been a reasonable man in coming to that conclusion. So stated the proposition in favour of supporting this judgment seems to be completely self-destructive.

On the facts I will only say this—That I see no occasion to invoke authority. As we have experienced, authority in these cases is too often a source of much confusion. Because when you enter the region of authority in discussing propositions in fact so elementary and so simple as occur here, you are extremely apt as a court of law to be led by the temptation of legal formulæ into what is essentially a usurpation—that is to say, into the position of upsetting for a supposed legal reason something which exists and remains from beginning to end in the region of fact.

As I look at this case, a steward on board ship is lying in his bunk, and is ordered to leave his bunk to make tea for his comrades, and he leaves his bunk; all that is admitted. I infer that he left his bunk because he got an order to do so and obeyed it. Is that a surmise, or is it a conjecture? I am responsible, I observe, in some of these decisions for raising a distinction between an inference and a conjecture. The distinction is as broad as philosophy itself. It is, that an inference rests upon premises of fact, and a conjecture does not. Now when you come to the region of inference, no one has ever suggested that the inference should be in syllogistic form so that all the points of its premises shall with apt and exact completeness justify the conclusion reached. Whenever you are in the position of saying that what you are determining is what a reasonable man would have done, *ex concessis* you admit that you are in a region in which from premises, more or less ample, a conclusion may be reached in one direction or another. Accordingly being out of the syllogistic region and into the work-a-day region of inference from fact, I ask myself, was I wrong to infer that this steward when he obtained the order to go and make tea, he being then in his bunk, left his bunk in obedience to the order?

Next, what sort of a man was it who thus left his bunk? In the first place, he was a man subject to attacks of nausea and sick-

ness; secondly, he was a man who at this odious call of nature had been in the habit of relieving his sickness by going to the ship's side. I infer that this sick man, suddenly ordered to leave his close bunk, took refuge at once in the fresh air and just did what he had done, as is proved, frequently before—he went to the side of the ship.

It is precisely in those cases where I think the Legislature with great wisdom has said, let the man who sees and hears things at first hand and has to consider the main issue determine it for himself. He has determined it favourably to this proposition with which he concludes, that this man sustained his death by an accident arising out of his employment.

I will add now to the narrative which I have given these further facts—that it is conceded in this case, firstly, that insobriety is not proved; it is conceded, secondly, that suicide is not proved; and thirdly, it is conceded that homicide is not proved; and therefore insobriety, suicide, and homicide being out of the case, accident remains to a seaman occurring immediately after an order in circumstances which, if the order was normally conformed to, would place him exactly where he had been before, his constitution in the few days not having changed from one which was apt to be attacked by nausea and sickness.

Were it not that my noble and learned friends opposite differ from this, I should say that a fairer case upon the whole for the inference that this unfortunate man met his death by an accident arising out of his employment I could not conceive. There are no judicial differences in these cases greater, strange to say, than the differences between judges as to whether a reasonable man could have come to a certain conclusion; and I again repeat that if the arbitrator appointed by the Legislature has come to that conclusion, and if even among ourselves we differ with regard to it, how can we charge as against him appointed by the Legislature that his conclusion was so unreasonable that no court of law can support it?

It appears to me that to do so would be a usurpation upon the part of a court of law. I have used in more than one of these cases before the expression that courts of law must take care that they do not usurp a function consigned to another quarter. I think it would be usurpation, because it is making a court of law enter the arbitrament of fact, and in that arbitrament I think the arbitrator is the final judge unless the conclusion which he reaches can be declared to be so unreasonable as necessarily to involve its being upset.

I say no further on this case except that I view with satisfaction the judgment of Lord Guthrie, who appears, although he differs from myself in regard to the facts, to have taken what I humbly regard as the correct judicial view of this subject when he says that it was not for him to form a conclusion himself, but he says—"It appears to me that we"—that is, the Division of the Court—"are not asked to draw any inference. What we are asked to do is to consider whether a certain inference could be reasonably drawn." I think that states the proposition with complete accuracy, and I cannot take upon myself the responsibility of saying that this arbitrator did not reasonably reach the inference to which he came.

LORD PARMOOR—I need say nothing here on the question of merit except to express my entire agreement with the views expressed by the noble Earl on the Woolsack. On the general question I agree with the noble Earl, but I desire to add a few words since I am differing from the carefully prepared judgment of a majority of the Judges in the Court of Session.

I cannot, however, say that the case appears to me to be one of any serious difficulty, or that it requires a close analysis of the differing conceptions involved in inference and conjecture. I have found no assistance by reference to cases which depend on different circumstances.

The only question of law which arises on the appeal is the competency of the arbiter to make the award, which he has made in favour of the appellant. If he is competent to make the award, unless there are no relevant facts found by him which would support his conclusion, or the relevant facts found by him are of such a character that it is not possible for a reasonable man to come to the same conclusion. No question as to the weight of the evidence adduced before the arbiter, and on which his findings of fact are based, comes or can come before your Lordships. This House is not concerned with the evidence before the arbiter in any way, and I cannot think that in this respect this House can go behind the findings as stated in the Special Case. I agree with the protest made by counsel for the respondents against printing in the appendix the evidence taken before the arbiter, but no reference was attempted to be made to it in the course of the argument. The point of law to be determined depends upon the special circumstances of the particular case. I agree with what was said in this respect by Lord Dunedin in the case of *Mackinnon*—"It seems to me" (these are the words of his Lordship) "that each case must be dealt with on its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at from direct testimony."

In this case the appellant was the wife of Lendrum, who was cook and steward of the s.s. "Turnberry" at the time when he was drowned. The first question for the determination of the arbiter is whether the drowning was an accident, as distinguished from violence or suicide. I cannot doubt that there are relevant facts on which it is competent for the arbiter to come to the conclusion that the death of Lendrum was due to accident. It is not challenged that the accident occurred in the course of Lendrum's employment, and the real objection, as stated in the able argument on behalf of the respondents, is that there is no evidence, or at least there is no relevant evidence, on which it is possible for the arbiter to come to the conclusion that the death of Lendrum

was due to an accident arising out of his employment, and that his decision is founded on mere conjecture. I cannot assent to this argument, and I agree with the judgment of Lord Guthrie.

It is not necessary, after the full analysis by Lord Guthrie, to re-state the facts found by the arbiter on which he bases his decision, but there are special factors which appear to me conclusive in favour of the case for the appellant.

Lendrum was drowned while employed on a vessel, and his death therefore resulted from an accident which might naturally arise out of his employment. This consideration appears to me to answer the somewhat extravagant general propositions which it was said might result from upholding the claim of the appellant, and to bring the case within much narrower lines. It was further proved that shortly before the accident Lendrum was ordered by his captain to prepare and serve tea for the crew, and it was quite within the competency of the arbiter to infer that he left his bunk for the purpose of fulfilling this duty. It was also proved that he had never been seen by the captain of the ship to be the worse of intoxicating liquor, but was subject to attacks of nausea and sickness, and was seen on some occasions vomiting over the side of the ship. I can see nothing impossible in a reasonable person drawing the inference that the accident happened during a vomiting fit while Lendrum was carrying out the orders of his captain. There are other factors which point in the same direction, but I do not propose to carry the analysis further, since in my opinion it is not necessary to do so, so soon as the conclusion is found that the finding of the arbiter is not impossible on the recognised test.

I wish to express no opinion either way on the reasonableness of the finding in itself as long as it is a possible finding for a reasonable man. This consideration is not only, in my opinion, quite irrelevant, but to enter upon it in any form opens a door which should be kept shut.

I am of opinion the appeal should be allowed.

Lord Dunedin—While I agree with what has been said by the noble Earl on the Woolsack, and by my noble and learned friend beside me, as to the principles on which remits should be made, I confess I am just a little apprehensive that the remarks made by your Lordships to-day may be taken as going rather further than they were intended to go. Your Lordships will pardon me for saying that I am really here now rather speaking from my experience in the Court of Session, and knowing how impossible it would be to do justice to many of these cases without having remits. And I think it not out of place to remind your Lordships that this remit did not spring from any idea of the Judges themselves, but is exactly in terms of section 17, subsection (*g*), of the Act of Sederunt, which is equivalent to what your Lordships are familiar with as rules of Court in England, and as to which power is given by statute to the Court to make them. The Act of Sederunt says—"They," that is, the Court, "may always before giving their determination send back the case to the Sheriff for amendment." That is the real basis of a remit. The Court has got to deal with the case stated, and if the case is in itself incomplete, the Court has the right to have it made complete. Certainly the only facts which the Court is entitled to ask the Sheriff are facts which are relevant to the discussion before it, and the discussion before it is limited to a question of law, and therefore the only facts are facts which are necessary to raise the question of law, including in it of course the question whether there has been any evidence. I may say that there was certainly an attempt made in one quarter at one time to stop the Court of Session in this matter by refusing to state facts. That was dealt with in the case of *Euman* v. *Dalziel* in the year 1912, 49 S.L.R. 693, in which I said (p. 694) at the time—and I have no cause to go back upon what I said—"It has been conclusively settled by decisions of the House of Lords and of this Court that although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported upon the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion. It has been said more than once that this criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence. It is not a question of whether a decision is right or wrong, but a question of whether there was evidence led upon which the decision can be supported. I think as soon as that position has been laid down it is quite impossible for us to direct our minds intelligently to the question unless we have before us a stated case which will give us a description of what the evidence that was led was."

Now I admit that when I look at this particular remit I find certain facts in it which I consider of more than doubtful relevance. At the same time, the first two of the facts are facts upon which I think it was quite proper for the Court of Session to have the opinion of the Sheriff, because they bore directly on the fact whether there was evidence upon which he could go or not, and I should have rather hesitated to express myself as strongly as some of your Lordships have done, because although I admit that I do not myself see the relevance of other facts, yet we do not know the precise reasons that made the learned Judges give the remit upon that point, and I hesitate to condemn them unheard. And in particular I would say this—first, that I do not see how it is possible that the learned Judges should discover that the case is incomplete except upon the statements of counsel who are before them; and, secondly, so far as I know by experience, the motions

for amendment of a case come just as often from one side as they do from the other.

Now, having said so much upon the remit, I do not propose to trouble your Lordships with any views of mine upon the general question. I had to consider the matter in the case of *Mackinnon* v. *Miller*, 46 S.L.R. 299—a case which I apprehend none of your Lordships disagree with, and I refer to my judgment in that case. The conclusion that I came to of the criterion, as it is not long, I shall here repeat. I said in that case, and I repeat it in this—"It seems to me that each case must be dealt with and decided upon its own circumstances, and that inferences may be drawn from circumstances just as much as results may be arrived at by direct testimony;" and then in that case I went on to say—"Here the learned Sheriff-Substitute cannot be said to have drawn an inference which no reasonable man could draw, and that being so, that it is not for your Lordships to interfere with his decision." Now that criterion commends itself to all your Lordships, because you have really expressed the same thing in other, and I doubt not, in better words.

I am bound to say that if the matter was open to me I should agree—in fact I do agree—with the views of my noble and learned friend beside me (Lord Atkinson), and if I may say so, I feel still more certain of this, that if I had been sitting in the Second Division I should have come to the same conclusion as they did, and I should have come to that conclusion, not so much upon what I thought myself, but because I should have thought I was loyally carrying out the views of the House of Lords as expressed in *Marshall* v. "*The Wild Rose*," [1910] A.C. 486, 48 S.L.R. 701, and more particularly would I have thought I should have carried out the views of my noble and learned friend opposite, because I agree that his argument in one sense cannot be controverted. I quite agree that, taking the criterion as I have set it down, I admit myself out of Court when three of your Lordships say that you would have came to the same conclusion as the arbitrator. I can only say that I look in vain for any evidence in this case. It all turns upon one point, whether there is any evidence which, so to speak, associates this man's duty with his being at the side of the ship. I can find none. I say no more, because my noble and learned friend beside me has dealt at length with that matter. I should not even have dissented were it not for this, that although the opinion of my noble and learned friend beside me and myself cannot influence the decision of your Lordships, at least I hope it may serve as a hint to some arbitrators that they really must go upon facts and not confine themselves to guesses.

Their Lordships reversed, with expenses, the interlocutor appealed against.

Counsel for the Appellants — Clement Edwards, M.P.—Wetenhall. Agents—J. & A. B. Boyd, Ayr—Lindsay, Cook, & Dickson, S.S.C., Edinburgh—Alexander Smith, London.

Counsel for the Respondents — Horne, K.C. — Alex. Neilson. Agents — Maclay, Murray, & Spens, Glasgow—J. & J. Ross, W.S., Edinburgh — Botterell & Roche, London.

Friday, July 17.

(Before Earl Loreburn, Lords Dunedin, Atkinson, Shaw, and Parmoor.)

CLARK *v.* GEORGE TAYLOR & COMPANY.

(In the Court of Session, March 6, 1914, 51 S.L.R. 418, and 1914 S.C. 432.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* 1(*b*)—"*Incapacity for Work Results from the Injury*"—*Tendency to Obesity Increased by Enforced Idleness Caused by Injury.*

A workman was injured by accident arising out of and in the course of his employment on 7th October 1910, and his employers paid him compensation up to 11th July 1913, when they ceased payment on the ground that he had recovered from the effects of his injuries. A remit having been made a medical man reported—"(1) The defendant has recovered from the direct effects of his injury but not from the indirect. (The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind.) He is not fitted to undertake any work other than that of a more or less sedentary character—for example, a watchman." And again—"The man's incapacity for work has arisen from the fact that he has been doing no hard work during the last three years." The arbiter "found that his partial incapacity on 8th October 1913 did not result from the injuries sustained by him on 7th October 1910."

Held (*rev.* judgment of the First Division) that the arbiter might so find.

This case is reported *ante ut supra.*

George Taylor & Company, the respondents in the Court of Session, appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN—If I were to act upon my own opinion of the merits of this case and regarded that as being within my province I should draw a conclusion from the evidence as contained in the award the same as that which was drawn by the Court of Session. I agree with the reasoning, and I think, if I may respectfully say so, that the conclusions they arrived at were the same conclusions as I myself should have come to. That, however, is not what we have to consider.

In this case the only point raised before the arbiter was whether the present inca-