acted as trustees under the truster's trust-disposition and settlement. The grounds for removal were the bankruptcy of the trustee and his general incapacity to manage the trust. The objecting son, while he did not oppose the removal of the trustee, contended that it was in the circumstances incompetent for the Court to appoint new trustees, and that its power was limited to the appointment of a judicial factor.

The Court *removed* the trustee, and appointed the truster's testamentary trustees to be trustees under the marriage-contract.

By a marriage-contract entered into between Henry Lamont and Mrs Jane Curle or Lamont, Henry Lamont assigned to trustees (to whom powers were given to assume new trustees) a policy of insurance for £2000, the purposes of the trust being the payment of an annuity of £200 to his widow, and upon her death the payment of the fee to the issue of the marriage. By the marriage-contract Mrs Lamont assigned to the trustees her whole means and estate to be held for herself, and, after her death, her husband in liferent, and to be paid to the issue of the marriage in fee. At the date of the truster's death the only surviving trustee was his brother Charles Lamont, the other trustees having predeceased the truster, and no additional trustees having been assumed.

Shortly after his death his widow and four of his children presented a petition to the Inner House craving the Court to remove Charles Lamont from his office of trustee, and to nominate and appoint as new trustees the persons who were the trustees under the trust-disposition and settlement of the deceased Henry Lamont. These included three of the petitioners, viz., the widow and two of the children.

In his trust-disposition and settlement Henry Lamont had expressly directed his trustees to fulfil all the obligations incumbent upon him under his marriage-contract.

The grounds upon which the petitioners asked for the removal of Charles Lamont were that he was a bankrupt, and otherwise a person incapable of properly managing the estate.

Charles Lamont lodged answers, in which he objected to being removed.

Henry Charles Lamont, a son of Henry Lamont, also lodged answers, and while not opposing the prayer for the removal of Charles Lamont, objected to the appointment of Henry Lamont's testamentary trustees, stating that he was "dissatisfied with the course of administration pursued by the trustees in regard to part of the said Henry Lamont's affairs." He suggested the appointment of a judicial factor.

Argued for the petitioners—On the question of the appointment of new trustees or a judicial factor—Under the *nobile officium* the Court had the power to appoint new trustees; they were not restricted to appointing a judicial factor—M'Laren's Wills and Succession, vol. ii, p. 1132, and following; Menzies on Trustees, vol. i, p. 36; *Aikman, &c.* v. *Duff*, December 2, 1881, 9 R. 213, 19 S.L.R. 160; *Miller and Others* v. *Black's Trustees*, July 14, 1837, 2 S. & M'L. 866, *affirming* 14 S. 555. The appointment of a judicial factor meant increased expense and double administration, and the interests of all the beneficiaries, and the wishes of the deceased Henry Lamont would not be furthered by the appointment of his testamentary trustees.

Argued for the respondent Henry Charles Lamont—A judicial factor should be appointed, the Court having no right or power to appoint trustees in the circumstances disclosed, and there being no reported case in which in analogous circumstances it had ever done so. It was of no avail to appeal to the *nobile officium*, for the Court only exercised the *nobile officium* on the lines and within the bounds established by precedent—Stair's Inst. iv, 31—and there was no precedent for the exercise now demanded by the petitioners. Section 12 of the Trusts (Scotland) Act 1867 empowered the Court to appoint new trustees in circumstances specified. The reasonable inference from that section was that except in the circumstances therein specified, and except in a petition brought under that section, the Court had no power of appointment. None of the circumstances provided for in that section were present in this case, and the present was not a petition under that section. There was nothing to prevent the assumption of new trustees under the trust-deed itself. See *Graham*, June 26, 1868, 6 Macph. 958. The usual and only proper course was to appoint a judicial factor. *Miller, cit. sup.*, was a case of a lapsed trust, and in *Aikman* there was an agreement that there were to be new trustees.

The Court *granted* the prayer of the petition and removed the trustee, and appointed the trustees under the deceased's trust-disposition and settlement to be trustees under his marriage-contract.

Counsel for the Petitioners — Dickson, K.C. — Orr-Deas. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Respondent (Henry Charles Lamont) — Carmont. Agents — Bruce & Black, W.S.

Tuesday, June 30.

SECOND DIVISION.

[Sheriff Court at Paisley.

MARTIN *v.* FULLERTON & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident "Arising out of and in the Course of the Employment"—Workmen Jumping from Quay to Vessel instead of Using Gangway—Disobedience to Orders.*

A labourer, working overtime on a vessel moored some six or seven feet

from a quay, went ashore between 9·30 and 10 p.m. to purchase some bread, although told not to go by the foreman. He might have made the purchase during the interval at tea time. On returning he passed the gangway, which formed the ordinary means of boarding the vessel, and which was in its proper position, and attempted to jump from the quay to the deck. He fell into the water and was drowned. There was a rule, frequently, however, broken, that the men were not to jump between the vessel and the quay, and the foreman had often warned the deceased against the practice.

Held that the accident did not arise out of and in the course of the deceased's employment.

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

In an arbitration under the Workmen's Compensation Act 1906, in the Sheriff Court at Paisley, Robert Martin senior, Paisley, claimed compensation from John Fullerton & Company, shipbuilders, Paisley, in respect of the death of his son Robert Martin junior. The Sheriff-Substitute (LYELL), having refused to award compensation, stated a case on appeal, in which the following *facts* were set forth as proved:—"The deceased Robert Martin was a labourer in the employment of the respondents, and on Thursday, 31st October 1907, he was sent as one of a squad, consisting of a foreman painter, a journeyman painter, and three labourers, to do painting work on a vessel, 'The Pine,' then moored at Irvine Harbour. They wrought all Thursday after breakfast time, and before dinner time on Friday the foreman asked the men whether they were willing to work overtime all Friday night in order that they might finish the job and return home to Paisley at 12 noon on Saturday, 2nd November. To this the men agreed. The three labourers, of whom the deceased was one, provided and cooked their own food, and, by permission of the owners, slept on board on the Thursday night. On the Friday evening, during the tea-meal, the deceased said that they must get some bread in order to have something to eat during the night, but though the bread shop was only a hundred yards distant from the place where the vessel was moored, none of them took advantage of the meal time to go ashore and buy provisions. Between 9·30 and 10 p.m. the deceased asked the youngest labourer, Whyte, to go and buy bread, who refused. The deceased then told the foreman that he was going himself to get a loaf, who forbade him to go, and told him to send the boy (Whyte), because the deceased was the most useful man at his work. The deceased, however, persisted in going, saying that he would not be long, and the foreman made no further remark. The deceased accordingly went ashore to get bread. He was, however, unsuccessful, as the stock was sold out, and he immediately returned to the ship. He attempted to jump on board, but failed, fell into the water, and was drowned. The night was dark. The vessel was moored some 6 or 7 feet from the quay, and her deck at the place where the deceased attempted to jump was some 3 feet higher than the surface of the quay. A safe and sufficient gangway was to the deceased's knowledge placed between the vessel and the quay, for the use of the workmen. It was against the rules of the employment for a man to jump between the vessel and the pier, though that rule was frequently disregarded. The foreman generally checks the men when he finds them doing this, and, in particular, he had frequently warned the deceased against the practice. Just before the deceased attempted to jump, Irvine Johnston, a fellow-workman, who was on the quay, shouted to him not to attempt it; but in spite of this he persisted in doing so, after shouting back something which Johnstone did not catch. Before reaching the place where he attempted the leap, the deceased had passed the end of the gangway which was resting on the quay. Where he jumped was nearly abreast of the engine room in which he had been working."

The Sheriff further stated—"I held (1) that in going ashore to buy bread the deceased was acting contrary to the orders, or at least without the permission, of his foreman; (2) that in any event there was no necessity arising out of his employment for his leaving his work to go ashore at the time he did, seeing that he knew early in the day that he was to work all night, and should have made provision for the refreshment in his own time; and (3) that in attempting to jump on board he was deliberately breaking a rule after sufficient warning, it being no part of his employment to attempt to go on board by this dangerous method when a safe gangway was to his knowledge provided for his use. I therefore found that the accident did not arise out of and in the course of the deceased's employment, and dismissed the application."

The *question of law* for the opinion of the Court was—"Whether the arbitrator was right in holding that the accident did not arise out of and in the course of the deceased's employment?"

Argued for the appellant—The accident arose out of and in the course of the deceased's employment. Possibly there was ground for saying that it was attributable to his serious and wilful misconduct, but where the accident resulted in death or serious and permanent disablement the right to compensation was not affected by serious and wilful misconduct — Workmen's Compensation Act 1906, sec. 1 (2) (*c*). The following cases were cited:—*Keenan* v. *Flemington Coal Co., Limited*, December 2, 1902, 5 F. 165, 40 S.L.R. 144; *Blovelt* v. *Sawyer*, [1904] 1 K.B. 271; *Mullen* v. *D. Y. Stewart & Co., Limited*, June 17, 1908,

45 S.L.R. 729; *Robertson* v. *Allan Brothers*, 1908, 124 L.T. (O.S.) 548.

Respondent's counsel were not called upon.

LORD JUSTICE-CLERK—I have no difficulty in this case. In many cases which have come before the Courts troublesome questions have arisen as to whether the particular accident for which compensation was sought did or did not arise out of and in the course of the injured person's employment. But the line must be drawn somewhere, and I think it clear that here the claim for compensation is excluded.

On the evening on which the accident occurred the deceased workman left the vessel on which he was working and went ashore contrary to the orders of the foreman. On his return he attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was against the rules of the employment for a workman to jump between the vessel and the pier, and on the occasion in question there was a gangway in position for the use of the workmen. The deceased might have used this gangway, but instead of doing so he went along the quay passing the end of the gangway, and met his death, as I have said, while attempting to jump to the vessel. His passing the gangway and going further than he required to do in order to go on board by the proper means provided, does to my mind make it clear than when he went to where he did, and tried to jump on board, which he had been warned not to do, he was not acting in the course of his employment, and that the accident did not arise out of his employment. I am clearly of opinion that the question of law must be answered in the affirmative, and I move your Lordships accordingly.

LORDS STORMONTH DARLING and ARDWALL concurred.

LORD LOW was absent.

The Court answered the question in the affirmative.

Counsel for the Appellant — Hunter, K.C.—J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents — C. D. Murray — J. H. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Friday, July 3.

SECOND DIVISION.

[Sheriff Court at Glasgow.

RENNIE *v.* REID.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 13—"*Workman*"—*Casual Employment — Employment for Purposes of Business—Window Cleaner—Doctor.*

The Workmen's Compensation Act 1906, section 13, enacts—"'Workman' does not include . . . a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business . . ."

A jobbing window cleaner was in the habit of going to a doctor's house once a month to clean the windows. There was no formal contract between the parties, and no invitation was sent or special permission given, but the window cleaner went on the chance of getting the job, rang the door bell, was admitted by the servant, and did the work. Among the windows he cleaned was included that of the doctor's consulting room or surgery. On the occasion of one of his visits, while cleaning the dining-room window, he fell into the area and was injured.

Held that the employment was of a casual nature and was not for the purposes of the employer's trade or business, and that accordingly the injured man was not a "workman" within the meaning of the Act, and was not entitled to compensation.

Hill v. *Begg*, June 4, 1908, *Times* L.R., vol. 24, p. 711, *followed*.

In an arbitration under the Workmen's Compensation Act 1906, between George Rennie, window cleaner, Glasgow, and Dr W. L. Reid, 7 Royal Crescent, Glasgow, the Sheriff-Substitute at Glasgow (BOYD) refused compensation. At the request of Rennie he stated a case on appeal.

The following *facts* were set forth as proved—"(1) That the respondent resides with his family at 7 Royal Crescent, Glasgow, and also uses a portion of the premises in connection with his professional practice. (2) That the appellant is a jobbing window cleaner, and that on 27th December 1907 he was cleaning the dining-room window in the respondent's said house, when he fell into the area, and sustained injuries which have since incapacitated him for pursuing his usual employment. (3) That his average weekly earnings were £1. (4) That for some years the appellant has been in the habit of cleaning the respondent's windows about once a month. (5) That the work occupied about three or four hours, and the appellant was paid 3s. 4d. on each occasion, being at the rate of 2d. per window. (6) That he did not wait for a special invitation on each occasion, nor did he ask special permission, but he called, was admitted, and did the work. (7) That