LORD KINNEAR — I agree with your Lordships.

LORD PEARSON—I am of the same opinion.

The Court answered the first and second questions in the negative and the third in the affirmative.

Counsel for First and Second Parties—Macmillan. Agents — Webster, Will, & Company, S.S.C.

Counsel for Third and Fourth Parties—J. H. Millar. Agents—Gillespie & Paterson, W.S.

Counsel for Fifth Party — Sandeman. Agents—Mackay & Hay, W.S.

Tuesday, January 12.

FIRST DIVISION

[Sheriff Court at Edinburgh.

MACKINNON *v.* MILLER.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of and in Course of Employment — Evidence — Seaman Found Drowned Beside Vessel—No Direct Evidence as to how Death Occurred—Inference by Arbiter that Death Due to Accident Arising out of and in Course of Employment—Review.*

M., who was employed as an engineer on board a small steam tug, was last seen asleep in his bunk at 5 a.m. An hour afterwards he had disappeared, leaving his working clothes lying at the side of his bunk. The tug was to commence towing at 7 a.m. that morning, and steam had been ordered to be got up for that hour. The deck was a place where between 5 and 7 a.m. M. was entitled to be. Two days afterwards M's body, clad in his ordinary sleeping clothes, was found in the water near the place where the tug had been moored on the morning in question. In the opinion of the doctor who examined the body, M.'s death was due to drowning. There was no direct evidence as to how M. (who was unable to swim) had met with his death.

Held that the arbiter was entitled to draw (as he had drawn) the inference of fact that M. had accidentally fallen overboard and been drowned, and that the accident arose out of and in the course of his employment, and that accordingly it was not for the Court to interfere with his decision.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *secs.* 7 *and* 13 *—Seaman—Vessel Let to Charterers — "Employer" — Whether Charterer or Owner—Crew Provided and Paid by Owner, who Alone could Dismiss them.*

A, the registered owner of a steam tug, chartered her to B. Under the charter-party A was bound to provide and pay a crew of two men, including M., and A alone had power to dismiss them. The possession, control, and management of the vessel under the charter-party belonged to B.

Held that A, and not B, was M.'s employer within the meaning of the Workmen's Compensation Act 1906.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—sec. 7 (1)—"This Act shall apply to . . . seamen, . . . provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom. . . ." Section 13 enacts — "In this Act, unless the context otherwise requires, 'employer' includes any body of persons, . . . and where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person. . . ."

Mrs Helen Moncrieff Whitecross or Miller, 38 Hawthornvale, Leith, widow of George Aitken Miller, engineer, Leith, as an individual, and also as tutrix and administratrix-in-law for G. A. Miller, her pupil child, claimed compensation from Archibald Mackinnon, steam-tug owner, Leith, in respect of the death of her husband, the said George Aitken Miller. The Sheriff-Substitute (GUY) having awarded compensation, a case for appeal was stated.

The case stated—"This is an arbitration in which the respondent claimed compensation from the appellant under the Workmen's Compensation Act 1906 for herself and child, as being wholly dependent upon the earnings of her late husband George Aitken Miller, who met his death by drowning at Ballachulish on the morning of Saturday, 15th February 1908.

"The following facts were admitted or proved:— . . . (1) The appellant is the registered owner of the steam tug 'Renown' of Leith. (2) The 'Renown' is a small screw steamer of 15·22 tons register, 70 feet in length, and 16·5 feet beam. (3) The deck of the 'Renown,' which is of iron except the forward part, which is planked with wood, is all practically flush, but in the centre of the deck the boiler casing projects from it to a height of about a foot at the part nearest the bulwarks, and to a greater height in the centre of the vessel, while the wheel by which the vessel is steered is placed at the forward end of the boiler casing. (4) Bunks for the crew were provided in the part of the vessel forward of the engine and boiler space. (5) Access to the fore cabin was obtained by a small hatch on the deck a few feet forward from the wheel. (6) On the deck in front of the boiler casing and wheel were a water-tank and a chain chest of a about 2 feet in height. (7) Access to the engines and to the firehole

and to an after cabin in which stores were kept could only be got from the sleeping place by coming on deck by the said hatch and passing along the deck between the boiler casing and the bulwark—a space about 3 ft. 6 ins. in width. (8) The bulwark was 20 inches in height. (9) The steering chain crossed this narrow part of the deck on either side abreast of the wheel, and would lie either upon the deck or 2 or 3 inches above it, according to how the wheel had been left; there was a closet in the forepeak entering off the fore cabin, but owing to the discomfort caused by the smell proceeding from it the crew did not use it, but went to the fire hole in order to to relieve themselves. (10) From the beginning of May 1907 to the end of September 1907 the 'Renown' had been employed in towing barges laden with sand on Loch Leven from Ballachulish to Kinlochleven, and the deceased George Aitken Miller, engineer, who resided at 38 Hawthornvale, Leith, was one of the crew appointed and paid by the appellant. (11) In the beginning of the year 1908 the appellant proposed to send the 'Renown' to Loch Leven for similar employment, and at the same time the wages of the said George Aitken Miller were increased from £2 per week to £2, 5s. per week. (12) In January 1908 the said steam tug was chartered by Sir John Jackson, Limited, for towage purposes in Loch Linnhe, Argyllshire, and its branches. (13) The appellant was bound under the charter-party to provide and pay a crew consisting of two men, while the charterers were to appoint and pay the master and any additional men that might be required; the charterers had no power to dismiss the said two members of the crew; the insurance of the vessel, and all provisions, deck, and engine-room stores, were to be paid by the appellant, by whom the vessel was to be maintained in an efficient state, while fuel, port charges, &c., were to be paid by the charterers. . . . (14) On 6th February 1908 the 'Renown' sailed from Leith to go *via* the Caledonian Canal to Ballachulish for delivery to the charterers. (15) She arrived at Ballachulish on or about 11th or 12th February, and was on the 12th February delivered to the charterers, from which date she was being employed under the said charter, and the possession, control, and management of the said vessel were in the charterers. (16) The air feed pump of the engines had been giving some trouble, and the appellant had intimated to the deceased that Mr James Macdougall, his superintending engineer, would meet the 'Renown' either at Ballachulish, or between there and Kinlochleven on the forenoon of Saturday, 15th February. The object of Mr Macdougall's going there was to repair the engine, and the defect was not in any way attributable to the deceased. (17) On the night of Friday, 14th February 1908, the said steam tug was moored to a barge which was moored to the jetty at Kinlochleven. (18) On the night and morning of the 14th and 15th February there were no lights burning on the 'Renown' and her deck was in darkness. The weather conditions were such that there was no unusual motion of the ship. (19) The 'Renown' was to be ready to commence towing at 7 o'clock on the morning of 15th February. (20) On the night of 14th February, the master, the said George Aitken Miller, and the fireman were on board and occupied their usual sleeping bunks in the cabin, and the deceased was then in his usual health and had apparently nothing on his mind and was looking forward to the respondent coming to Ballachulish with his son in July following. (21) About 5 o'clock on the following morning, Nicholas Wills, the master of the 'Renown,' and the fireman were both awake and saw the deceased in his bunk. (22) Afterwards they fell asleep again, but about 6 o'clock the deceased was not in his bunk. (23) The deceased was never again seen alive, and no person witnessed how he came by his death. (24) One of the bunker lids of the 'Renown' was missing at the same time as the deceased and has never been found, but it was not proved that this had any connection with the deceased's death. (25) The duties of the fireman usually took him on deck about an hour before the deceased commenced duty. (26) The master of the 'Renown' had ordered steam to be got up for 7 o'clock on the morning of the 15th of February. (27) The said fireman went on deck about 6 a.m. on the 15th of February. (28) The deceased by that time had disappeared, leaving his working clothes lying at the side of his bunk. (29) On the afternoon of Monday, 17th February, the deceased's body was found by a diver in the employment of Sir John Jackson, Limited, in the water close to where the 'Renown' had been lying on Saturday morning. (30) The deceased's body when brought up by the diver was dressed in his ordinary sleeping clothes as usually worn by him. (31) The body was examined on the same day by Dr M'Dougall, who found no marks on the body to indicate that the deceased had sustained any injury before getting into the water. In Dr M'Dougall's opinion the death of the deceased was caused by asphyxia, caused by drowning, and he certified it accordingly. (32) The deceased George Aitken Miller had been for a considerable number of years in the employment of the appellant, and he was a man of cheerful disposition and of sober, steady habits, careful in his work in every way, and enjoying the esteem of his employers. He was a good husband and father and was happy in his home life. He enjoyed good health but was slightly lame, the lameness not being of such a kind as to interfere with the performance of his duties as engineer. He was unable to swim. He did not commit suicide. (33) The sum of £295, 19s. 2d. is the sum equal to his earnings in the employment of the same employer during the three years next preceding the accident. (34) The deceased was survived by the pursuer, his widow, and by a pupil child, George Aitken Miller, who is eleven years of age. (35) The said widow and child were wholly dependent on the earnings of the deceased

at the time of his death, and were the only persons dependent upon his earnings."

The Sheriff-Substitute further stated—"I accordingly, taking into consideration the whole facts proved and admitted, drew the inference in fact that about 6 a.m. on the morning of 15th February the said George Aitken Miller left his bunk, went on deck, and accidentally fell overboard and was drowned, and that said accident arose out of and in the course of his employment as a seaman on board said vessel.

"I further found that the appellant, being the registered and actual owner of said vessel and also the employer of the deceased, was his employer within the meaning of the Workmen's Compensation Act 1906, and I therefore found the appellant liable in compensation under that Act to the extent of £295, 19s. 2d., and also found him liable in expenses."

The *questions of law* were—"(1) Whether on the facts admitted and proved I was entitled to hold that the deceased met his death by accident arising out of and in the course of his employment. (2) Whether the appellant, in view of the terms of the charter-party and the before-mentioned circumstances, was the person liable in compensation under the Workmen's Compensation Act 1906?"

Argued for appellant—There was no evidence as to whether Miller's death was due to accident or not. When last seen he was asleep in his berth. The burden of proving that his death was due to accident lay on the applicant, and unless she discharged it she could not succeed—*Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 719; *O'Brien* v. *The Star Line, Limited*, July 18, 1908, 1908 S.C. 1258, 45 S.L.R. 935. The applicant must also prove that the accident arose out of and in the course of the employment, *i.e.*, she must show that the deceased was occupied with his master's business, not his own, at the time—*Pomfret* (*supra*); *O'Brien* (*supra*); *Falconer* v. *London and Glasgow Engineering, &c., Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381. It was not enough to show that he was on board; the claimant must show that he had a duty to be on deck, for the natural place for him to have been at that hour of the morning was not on deck but in his bunk. There was no presumption that the accident, if unexplained, was within the employment—*M'Donald* v. *Owners of Steamship Banana*, [1908] 2 K.B. 926; *Reed* v. *Great Western Railway Company*, October 29, 1908, 25 T.L.R. 36. The question really came to be one of *onus*. To entitle a claimant to succeed in such circumstances as the present he had to establish the wide proposition that it was enough if the deceased met with the accident while on the premises, though how it happened might be totally unexplained. [The second question was not argued.]

Argued for respondent—This was a pure question of fact on which the Court would not interfere with the arbiter's decision unless he had taken an erroneous view of the law—*Henderson* v. *Corporation of Glasgow*, July 5, 1900, 2 F. 1127, 37 S.L.R. 857. The nature of the deceased's employment pointed to accident. In *Reed* (*supra*) the deceased had left his engine; here the deceased was on board. In *M'Donald* (*supra*) the deceased had left his ship. *Esto* that Miller was on deck, he was still in his employment, for he may have come there for a necessary purpose—*Blovelt* v. *Sawyer*, [1904] 1 K.B. 271; *Keenan* v. *Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144. A workman was not outwith his employment though not at work, unless he left the premises on his own private business—*Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141. The risk of falling overboard was one reasonably incidental to the employment, and if the circumstances in respect of time, place, and occasion showed that the risk encountered was reasonably incidental to the employment, the case in which it was encountered would fall within the Act.

At advising—

LORD PRESIDENT—The deceased George Aitken Miller was an engineer, and was at the time of his death employed upon a small tug called the "Renown," which was the property of the appellant in this case. At that time the tug was chartered by the firm of Sir John Jackson, Limited, for service in Loch Linnhe, but the deceased was undoubtedly the servant of and paid by the appellant, and although there is a question put in the case about that matter, the learned counsel very properly found it impossible to argue that anyone was the employer of the deceased except the appellant. There really came to be no question upon that matter.

Now, the facts as found by the Sheriff-Substitute as arbiter under the Workmen's Compensation Act are that on the 14th February the master of the tug, the deceased man Miller, and the fireman were all on board the tug, which at that time was moored to a barge which was moored to the jetty at Kinlochleven. The master and the fireman saw the deceased in his bunk on the tug at about five o'clock a.m. They then went to sleep again and did not awake till about six. At six o'clock the fireman went on deck in accordance with his duty, which was to be on deck an hour before steam had to be got up, and steam had been ordered to be got up that morning at seven o'clock. By that time the deceased Miller had disappeared out of his bunk, leaving his working clothes lying at the side of his bunk, and nothing more could be seen of him. A few days after, the body of the deceased, clad in his nightdress, was found in the water, close to where the tug had been lying on the morning which I have just described. Upon these facts the learned arbiter has made these findings. He says that "taking into consideration the whole facts, proved and admitted, (he) drew the inference in fact that about six a.m. on the morning of 15th February the said George *Aitken* Miller left his bunk, went on deck, and accidentally fell overboard and was drowned,

and that the said accident arose out of and in the course of his employment as a seaman on board said vessel."

The question of law submitted to us is whether the Sheriff-Substitute was so entitled to hold, and the argument adduced has been that inasmuch as under the statute a workman is only entitled to compensation, or his representatives, if he is dead, are only entitled to compensation where there has been an accident arising out of and in the course of the employment, the pursuers here have failed to prove their case. Now it is quite evident that so stated the question is one of fact, and of fact only. Your Lordships are not judges of fact, and you will only of course interfere with the arbiter's decision if it be shown that he has come to an erroneous decision upon fact either by being influenced in coming to his decision on fact by some erroneous view in law—a result which is possible—or by having, as it has been sometimes expressed, misdirected himself, or, further, if he has proceeded entirely contrary to evidence, or upon no evidence at all. In fact the position which your Lordships here hold is very analogous to, if not entirely the same as, the position which you hold in reviewing the verdict of a jury. It is said by the appellant's counsel here, and said quite truly, that there is an affirmative proposition to be proved by the pursuer, and that that affirmative proposition is not satisfied by simply proving that the man was found dead, but that you must establish the proposition that his death was by accident, and that the accident arose out of and in the course of his employment. But I opine that the determination of that proposition must still depend upon evidence, and must depend upon whatever class of evidence is available. The truth is, that when the matter is closely considered, there is after all no real difference between the result that the tribunal arrives at whether it is based upon direct testimony or upon what is called circumstantial evidence. Certainty is incompatible with human fallibility. However clear the direct testimony of a witness may seem to be, it always may be wrong, because the witness may be stating what he knows to be not the truth, or, if speaking the truth, he may be mistaken in his own judgment with regard to the matters which he is relating. No human being can discover anything from which he draws conclusions except through the medium of some one of his senses, and any one of these senses is liable occasionally to mistake. Accordingly, it is almost, you may say, an accident whether direct testimony or the inference drawn from circumstantial evidence is the more cogent. Where you have direct testimony in such circumstances that you feel absolutely sure that the witnesses are speaking the truth, and where also it seems so improbable as to be almost impossible that they have been deceived in their senses in comprehending the matters from which they have drawn their conclusion, that is as satisfactory testimony as can be got. But there may be many cases where what is called circumstantial evidence may lead to results so certain that it is quite as good as, if not better than, direct testimony. There is a well-known passage in King Henry VI, where Shakespeare makes Warwick illustrate with regard to the death of a heifer the class of circumstantial evidence which brings certainty to all minds.* Accordingly, it seems to me that here, where there is undoubtedly no direct testimony, there is nothing antecedently wrong in saying you may come to a certain inference although that inference is only based upon circumstantial evidence. I agree that if the learned Sheriff-Substitute's view was based upon such want of evidence, or such disregard of evidence, that we could say that it was a view to which no reasonable man had fairly a right to come, we could, although the question was one of fact, I think, correct his judgment. But I cannot say that I think that the inference that he drew from those facts was so violent as to entitle us to interfere with it. It really, I think, depends upon two propositions. The first is that the death of Miller was due to his accidentally falling overboard and being drowned. Well, of course, that you may say, is a conclusion which cannot be reached with absolute certainty. I agree, because nothing is absolutely certainly known except that his body was found with the symptoms of drowning in the loch. But it was found at the place where the vessel had been lying, and I honestly think that not only is it an inference which may be drawn, but it is an inference which an ordinary man would draw, taking into consideration the whole circumstances, nor is there anything to suggest that his death happened in any other way, or that there was any motive for his going over the side. I think the ordinary man might perfectly well draw the inference that he had met his death by tumbling off the deck. That, of course, is not enough. What then, shall we say as to the fact of whether the accident arose out of and in the course of the employment? That, again, is a matter of inference, but is it not an inference which may fairly be drawn? The deck was a place where Miller had every right to be; the deck was a place where even at that hour of the morning he might fairly be, not perhaps in the direct carrying out of his duties, but for indirect purposes with which these duties were not unconnected, because I suppose no one doubts—in fact the decisions have long ago settled—that you do not need to construe the words so strictly as to hold that a workman can never be in the course of his employment unless he is actually working. It has been held, as is shown in one of the decisions quoted to us, that a workman is for the purposes of the Act still at work although as matter of

* "Who finds the heifer dead and bleeding fresh,
And sees fast by a butcher with an axe,
But will suspect 'twas he that made the slaughter?"
Part ii, Act iii, Scene 2.

fact at the moment he is eating his dinner, and indeed if that were not so I think it would be somewhat difficult to carry out this Act, because I suppose the meditative pauses with which the British workman is so familiar would then not be with strict reading employment under the Act.

Accordingly it seems to me that here again the Sheriff-Substitute has drawn an inference. He need not have drawn it, but he has drawn it, and I cannot say that I think there is anything violent in the inference that he has so drawn. Of course when you find that a workman who meets with an injury, or comes by his death, is in a place which is *prima facie* unconnected with his employment, then you have a fact which tends the other way and prevents such an inference being drawn. Such was the case figured by one of the learned Judges in the case of a domestic servant meeting his death in the street. A domestic servant's employment is not in the street, and yet it would be perfectly possible by evidence to show that he was executing his employment though he was in the street. It would just bring out the difference of the situation, to use the learned Judge's illustration, according as to whether a butler, as in the case that he figured, was carrying a message for his master, and in the course of carrying that message was run over by an omnibus, or whether he was going to spend an evening at the Franco-British Exhibition for his own enjoyment. In the one case he would be in the course of his employment, and in the other he would not.

A very good illustration of the contrast which occurs upon facts may be taken by comparing the two cases, neither of which is binding upon us, but with the judgments in which I agree, namely, the case of *Pomfret* v. *The Lancashire and Yorkshire Railway Co.*, [1903] 2 K.B. 718, and the case of *M'Donald* v. *Owners of the Steamship "Banana,"* [1908] 2 K.B. 926. In *Pomfret*, which was a case in which a fireman fell out of a third-class railway carriage on a journey which he had to make in the course of his work, although in the course of that journey he did not actually stoke, the Court drew the inference that he had met with the accident in the course of his employment. In the case of *M'Donald*, a donkeyman, who had gone on shore and was returning on board his ship, fell off the gangway and was killed, and no more being known about it, the judges said that there were no facts there from which they were driven to draw the inference that it was in the course of his employment. But I think Lord Justice Kennedy foresaw just such a case as we have here, because, having given his opinion to the effect I have just stated, and having pointed out that the *onus* was upon those who sought to prove that the accident was in the course of the employment, he says this—"At the same time I wish to be understood as deciding upon the particular facts of this case in this respect, that we have to consider the case of an accident happening to a man at a place where he would not necessarily or naturally be in order to fulfil the duties of his employment. I express no opinion as to the propriety or impropriety in point of law of an inference bringing an accident within the terms of the Act of Parliament where that accident has happened upon the premises where the workman's service is to be rendered to his employer, as, for example, if this workman had been found fatally injured by a fall in the stokehold or any other part of the ship where in the course of his duty he might naturally and properly be, although there were no circumstances to show why at the particular moment he was there, or what the particular duty was which called him there. In the present case the accident happened whilst M'Donald was outside the ship, and without proof that there was anything which at the time and place of the accident made it part of the duty of his service to incur the risk which proved fatal."

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 from direct testimony; that 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.

LORD M'LAREN—With regard to one of the questions as to which very little was said in the argument, that question depends upon the circumstance that the services of Mr Miller, who met his death in the manner stated, were let along with the ship, and therefore the appellant was still the owner of the ship and Miller was his servant, and not the servant of the tenant of the ship. That is quite clear, and there can be only one answer to this question. With regard to the question which was seriously argued, whether this was an accident arising out of and in the course of the employment, the facts stated by the Sheriff make it clear that Miller was on board the ship in fulfilment of his contract. He would have been in breach of his contract if he had not been on board during the night, because it was his duty to be there in case of emergency, but more especially that he might get up steam at an early hour in the morning so that the ship might proceed at seven o'clock. It is a very common occurrence that it is part of a workman's duty to be on the master's premises at a time when he is not working, but for the purpose of being ready to work at the appointed time. The accident occurred, then, during the time that Miller was on board in the discharge of his duty, and the question really divides itself into two—whether this was an accident, and if so, whether it was one of the accidents which fulfil the statutory condition. The Sheriff has found that the man met his death by accidental drowning. He was seen in his bunk an hour before daylight, and an hour later he was missing, and his body was afterwards found in close proximity to the ship. Well, it is not of much consequence on that branch of the

case whether we consider that the Sheriff had power to draw the inference that he drew, or whether we agree with him in the inference that he drew, because in my judgment there was no possibility of coming to any other conclusion than that the man met his death by accidental drowning. Indeed, the Sheriff has taken care to exclude all other causes, because he has made a special finding that the man did not commit suicide, and he makes no finding that any stranger had been on board, or that the man had left the ship. That, however, I suppose, is not much in dispute between the parties, the real question being whether this death by accidental drowning can be described as an accident arising out of and in the course of his employment. I think the Sheriff meant to leave it to us upon the facts found by him to say whether he had rightly interpreted the statute in holding that this was a case fulfilling the statutory condition, and I think there is enough law in the matter, as it involves the interpretation of the statute, to entitle us to review the judgment upon these grounds.

There are many cases where an accident may arise while a man is on the master's premises but not engaged in active work, and whether he is there going about the premises in the ordinary course of business, or whether he is going about the premises in pursuance of the necessities of life, such as eating, drinking, respiration, and other things that need not be mentioned, and is not doing anything that is either wrong or against his contract or outside his employment, in such a case I do not doubt that the accident must be treated as one arising out of his employment. It has been so held in cases both in Scotland and in England. But, on the other hand, if a man is doing something unlawful, or if his accident is due to something that is being transacted between him and other people with which the master has nothing to do, such facts might raise an exception. It is not at all necessary for the purposes of this case to endeavour to find a criterion as to what class of cases would fall within or without the rule. It is enough to say that there are some cases which fall outside the rule. One of them was the case recently decided by this Court, the case of *O'Brien* v. *The Star Line*, July 18, 1908, 45 S.L.R. 935, a case which resembles the present in that it was an accident occurring to a man on board ship during the night. But in that case the injured man was found lying at the bottom of a hold into which he could only have got by going into a part of the ship where he had no business, and to reach which he must have broken a door. The circumstances of the case seem somewhat strange, but they are explained by the fact that the man was tipsy. We were of opinion that that was not an accident arising out of his contract, because, although he was on board the ship in the course of his employment, he was not there for the purpose of breaking open a door and falling into the hold. I think we had not the case of *Reed*, October 29, 1908, 25 T.L.R. 36, before us at the time. That case was decided about the same date by the House of Lords, and entirely supports the judgment of this Court. Indeed, had the case of *Reed* been before us it would have made it impossible for us to come to any other conclusion than that at which we arrived. But then in the present case, although the man was not at rest in his bunk but had gone on deck, I am unable to see in the facts as stated any theory that will take the case out the ordinary rule. I cannot hold it proved that he was doing anything outside his work. He may have been on deck for a legitimate purpose, and there is nothing to show that he either misconducted himself or exposed himself to unnecessary risks. Therefore I think that the Sheriff was entirely justified in coming to the conclusion to which he came, that this was a case falling within the category of an accident arising out of and in the course of the employment, and I agree with your Lordship that we ought to answer that question in the affirmative.

Lord Kinnear—This appears to me to be a pure question of fact, and I am unable to see that there is any reason for supposing that the Sheriff's decision was determined by any erroneous view of the law, or for saying that there was no evidence before him upon which he was entitled to decide as he did. The Sheriff's finding which follows the statement which he puts for our consideration is that having taken into consideration "the whole facts, proved and admitted, I drew the inference in fact that about 6 a.m. on the morning of 15th February the said George Aitken Miller left his bunk, went on deck, and accidentally fell overboard and was drowned, and that said accident arose out of and in the course of his employment as a seaman on board said vessel." It is impossible, therefore, to doubt that the Sheriff saw perfectly clearly that he had two questions to decide—first, whether the man met his death by accident; and secondly, whether the accident that happened to him arose out of and in the course of his employment; and that it was his duty to consider those two questions as questions of fact and decide them accordingly. It is true that the facts that are proved directly by evidence are not complete. But then it was for the Sheriff as arbiter to interpret these facts, and to consider whether from the facts he thought conclusively proved he might draw a further inference of fact, as he says he did. I think there was very little dispute—at all events I think we may take it that the Sheriff had no doubt that the man met his death by falling overboard by accident, because the Sheriff-Substitute finds that he did not commit suicide, and that his death was not due to violence offered to him by other people; and the only alternative left is that it was due to accident.

But then there arose a further question whether this accident happened to the man in the course of his employment and arose

out of his employment. That again is a question which the Sheriff had to consider, and is one of fact. There was evidence before him on which he was quite entitled to come to the conclusion that the accident happened while the man was on a part of the ship where he was naturally entitled to be in the course of his employment, and if he came to that conclusion he had further to consider whether it arose out of the employment or not. In the ordinary course of the man's employment it was necessary for him to spend the night on board this vessel, and, as your Lordship has pointed out, it has been decided in many cases that it is not necessary in order to bring the case within the scheme of the Act to show that at the moment at which the accident happened he was engaged in some particular duty, if the accident happened while he was in the ordinary course of his employment, and while he was on premises where his employment required him to be. Now it was for the Sheriff to consider that as a question of fact. It was said that it was quite possible, assuming that the man had fallen overboard by accident, that the accident might have happened not in the course of his employment at all, but because he had gone ashore or had attempted to go ashore on an errand of his own, and had fallen into the water in going from or coming back to the vessel. That was possible, but it was for the Sheriff to consider whether that was a reasonable probability which ought to affect his judgment, or whether it was a mere possibility which ought not to be taken into account, and there were facts before him upon which he required to form his judgment upon that particular question. He had to apply his mind to that question of fact, and consider whether there was any real likelihood that the man met his death in any other way, and he had to consider that in the same way as any reasonable man considers matters of probability in the conduct of his own affairs, and if he came to a conclusion upon a matter of that kind satisfactory to his own mind it is not for this Court, which is not a judge of the facts, to review his decision. It is said that his conclusion was not certain, but there can be no absolute certainty in probable matter; and the decision of the tribunal which is the judge of the fact is nevertheless final although the tribunal is not infallible. I am of opinion that we must answer the question in the way that your Lordship proposes.

LORD PEARSON—I did not hear the case.

The Court answered both questions in the affirmative and dismissed the appeal.

Counsel for Appellant—Blackburn, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for Respondent—C. D. Murray—J. B. Young. Agents—Bruce & Stoddart, S.S.C.

Tuesday, January 19.

SECOND DIVISION.

[Lord Mackenzie, Ordinary

INVERNESS COUNTY COUNCIL *v.* BURGH OF INVERNESS.

Local Government—Burgh—Extension of Burgh—Transference to Burgh of Area Forming Part of County—Adjustment of Liability for Loans Effected by County Council Secured on Rates Assessable on County including Transferred Area—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 11.

The boundaries of a burgh were extended under the provisions of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 11, so as to include an area which had formed part of the county and was situated within the first district of the county.

Held that the Town Council of the burgh were not liable in repayment of any part of loans effected by the County Council, prior to the extension, for the general purposes of the county or of the first district, and secured on assessments leviable by the County Council on the county or the first district.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 11, as amended by the Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), sec. 3, provides—"Upon the application of . . . the council of any burgh . . . it shall be lawful for the Sheriff, after hearing all parties interested, from time to time to revise, alter, extend, or contract the boundaries of such burgh for the purposes of this Act . . . and the Sheriff shall define in a written deliverance on such application the new boundaries of such burgh for the purposes of this Act, and such deliverance, unless appealed against in manner hereinafter provided, shall be final, and when recorded along with the application on which it proceeds in the Sheriff Court Books of the county, shall fix and determine the boundaries of such burgh for the purposes of this Act. . . . The Sheriff or Sheriffs in revising the boundaries of a burgh shall take into account the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, whether it properly belongs to and ought to form part of the burgh, and should in their judgment be included therein."

No provision is made by the Act for adjustment or transference of liabilities affecting areas brought within the boundaries of a burgh except in sections 21 and 22, which deal respectively with debts and obligations incurred by local authorities acting under the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), and amending Acts, and with the expenses payable for the preparation of the parliamentary register.

On 11th May 1903, by interlocutor of the