

the section quoted in rubric.] . . . Now it is put forward that the words "in time of vacation" are conditioned by the preceding words "in the event of a remit." I think that is an unnatural and inconvenient construction and that the words "in time of vacation" are dependent on the principal subject of the clause, viz., "the Court of Session in either Division thereof." That being so, the only question is whether last week was vacation. I think it was, and that it must be treated in the same way as the Christmas recess. Accordingly I think we ought to refuse the motion as unnecessary.

LORD JOHNSTON—*I concur.*

LORD MACKENZIE—*I also agree.*

LORD KINNEAR was absent.

The Court refused the motion.

Counsel for Petitioners — MacRobert.  
 Agents—Hope, Todd, & Kirk, W.S.

Thursday, June 29.

FIRST DIVISION.

[Sheriff Court at Falkirk.

M'LAREN & OTHERS *v.* CALEDONIAN RAILWAY COMPANY.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 1 (1)—"Arising out of the Employment"—Taking Shorter Route along Railway Line.*

A canal overseer in the employment of a railway company, in returning to his office on the canal from a railway station where he had been in the course of his duties, went along the railway line, which was shorter, instead of going by road. While walking along the line he was knocked down by a train and received injuries from which he died. In a claim by his widow and children under the Workmen's Compensation Act 1906, held that though the accident arose in the course of the deceased's employment, it had not arisen out of his employment, and that the employers were not liable.

Mrs Sarah Jane Johnston or M'Laren, widow of Alexander M'Laren, overseer on the Forth and Clyde Canal, who was in the employment of the Caledonian Railway Company at the time of his death, and others, appellants, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from the Caledonian Railway Company, respondent, and being dissatisfied with the determination of the Sheriff-Substitute at Falkirk (MOFFAT), acting as arbitrator under the Act, appealed by way of Stated Case.

The following facts were admitted or proved — (1) The deceased Alexander M'Laren was a canal overseer on the Forth and Clyde Canal in the employment

of the respondents. (2) He had been an overseer in the respondents' employment for 14 years. (3) It was part of his duty to issue application forms for what are known as 'privilege' railway tickets to the employees of the respondents employed on the canal. (4) His office and workshop were situated on the south bank of the Forth and Clyde Canal at Tophill, Camelon. (5) On 2nd September 1910, in accordance with instructions received from his superiors, and in connection with his duties with regard to privilege railway tickets, he went to Grahamston Station on the North British Railway and made a payment of money there for the respondents to the clerk in charge of the booking office, who received it on behalf of the North British Railway Company and gave a receipt therefor, said payment being for excess on a railway privilege ticket collected from one of the canal employees. (6) After making said payment at Grahamston Station he proceeded to go back to his office, where it was his duty, *inter alia*, to forward said receipt to his superiors in Glasgow. (7) In returning to said office he went along the railway line of the North British Railway from Grahamston Station towards a level-crossing at a swing bridge carrying the North British Railway which crosses the portion of the Forth and Clyde Canal over which the deceased was overseer. (8) While walking at the side of the railway line he was overtaken by a passenger train belonging to the Caledonian Railway Company, and running over said line in virtue of running powers possessed by the Caledonian Railway Company. (9) He was knocked down by the engine of said train and severely injured. (10) In consequence of the injuries so received he died on 5th September 1910. (11) In order to go from Grahamston Station to his office there was no necessity for the deceased to go along the railway line. (12) He could have gone perfectly easily by the public road. (13) Going by the railway line and getting on to the south bank of the canal at said swing bridge was a little shorter. (14) He had used the railway line for a number of years. (15) He had no right to do so. (16) The deceased had not been checked by the North British Railway Company's employees, but many other people have been checked for walking along the railway line. (17) He had been warned by one of his superiors not to go along the railway line. (18) The part of the line where he was overtaken by the train is very dangerous owing to the path at the side being very narrow, and the deceased himself increased the danger by walking on the same side of the railway as the traffic in the direction in which he was going. (19) The appellants are dependants of the deceased."

In these circumstances the Sheriff-Substitute held that the accident by which the deceased met his death arose in the course of his employment, but did not arise out of his employment.

The questions of law for the opinion of the Court were — "(1) Did the accident

arise in the course of the deceased's employment? (2) Did the accident arise out of the deceased's employment?"

Argued for the appellant—The arbiter having on the whole evidence reached the conclusion that the accident arose in the course of the employment was logically bound to find that the accident arose out of the employment. There were two ways in which an accident which arose in the course of a man's employment might yet not arise out of his employment—(1) when the workman did some other work than that for which he was engaged, and (2) when he went into territory into which he had no business to go—*O'Brien v. Star Line, Limited*, 1908 S.C. 1253, 45 S.L.R. 935. In the present case the workman was killed at a place where he was reasonably entitled to be, and as he was on his employer's business at the time it followed that the accident arose out of his employment—*Moore v. Manchester Liners, Limited*, [1910] A.C. 498, per Lord Loreburn, p. 500; *Conway and Another v. Pumpherson Oil Company, Limited*, March 9, 1911, 48 S.L.R. 632. The question was not as to the introduction of a risk over and above the employment, because this was exactly what happened in the case of serious and wilful misconduct which Parliament had negatived as a defence. This case was really *a fortiori* of *Conway*, because here there was no absolute prohibition against going on the line. [The LORD PRESIDENT referred to the case of *Kitchenham v. Owners of s.s. "Johannesburg"* in the House of Lords, June 3, 1911, 27 T.L.R. 504.] The present case was different from the case of *Kitchenham*, because in that case the seaman's duties were on board ship and he went ashore for his own purposes, while here the deceased's duties were also to act as messenger and he was killed while on his employer's business.

Argued for the respondents—The deceased was not a railway employee, though an employee of the Railway Company, and his duties were not connected with the railway. At the time of his death he was therefore at a place where he had no duty or right to be. All that was found was that he was going from one place where he had a right to be to another place where he had a right to be, but not that he was bound to go by the railway—*Kitchenham v. Owners of s.s. Johannesburg*, [1911] 1 K.B. 523, per L. J. Moulton; *Haley v. United Collieries, Limited*, 1907 S.C. 214, 44 S.L.R. 193; *Hendry v. Caledonian Railway Company*, 1907 S.C. 732, 44 S.L.R. 584. The present was a case of trespass, and the question whether the man was in the sphere of his employment was a question of degree. The accident here was not one which a person doing what the deceased was bound to do would be liable to incur. "Serious and wilful misconduct" was in a different category from the present.

At advising—

LORD PRESIDENT—The facts in this case are exceedingly clearly stated in the case of the learned Sheriff-Substitute. Indeed,

in view of some of the difficulties that we have had elsewhere, I should like to say that I think this case is a model of statement.

The point to be decided is whether the accident arose out of the deceased's employment. The learned Sheriff-Substitute found that it arose in the course of the employment, and there was really no argument presented to us to the contrary opinion.

Now I think two things are quite well settled by this time. The first is that the consideration of whether the accident arose out of the deceased's employment is a separate question, and is to be tried by different tests from the question of whether it arose in the course of the employment. If you find that the accident arose in the course of the employment you may have gone a certain way towards finding that it arose out of the employment, but you have not gone the whole way. The other point that I think is equally well settled is that the question whether it arose out of the deceased's employment cannot be solved, as Lord Kyllachy put it in *Haley v. United Collieries*, 1907 S.C. 216, by reference to any formula or general principle. Each case must depend upon its own circumstances.

In the circumstances of this case I am certainly quite unable to say that I think the Sheriff-Substitute came to a wrong conclusion, as I should have to do in order to allow the appeal. I am not going at any length into the authorities, because we have done so so recently, and within the last fortnight there have been two cases in the House of Lords upon this subject, and notably the case of *Kitchenham*.

Taking the facts in this particular case, I think it is clear that this man was in the course of his employment when, having gone to pay the money at Grahamston Station as he was told to do, he proceeded to go back to his own office upon the Forth and Clyde Canal, where he was just about to send off the receipt which he had got at Grahamston, and therefore that he was in the course of his employment—that he was engaged at that moment in his master's business I have not any doubt. But then what was the business? The business was to go with this receipt from Grahamston to his office on the Forth and Clyde Canal.

Now whenever you are about your master's business the question of whether an accident which comes about arises out of your employment or not may be tested—I would not say decided—but it may be tested by putting the question—Was the accident which happened one of the ordinary risks which a person in that employment is subjected to? Now if you had asked anybody what were the ordinary risks which a man who, on his master's business, goes from the Grahamston Station to his office upon the Forth and Clyde Canal—what were the ordinary risks which he runs—your interlocutor would answer that he ran the risk, *inter alia*, of being

run over in the streets or roads which he had to traverse; but he certainly would not say that one of the ordinary risks was to be knocked down by the engine of a railway train, while the man was in the act of walking along a narrow path where the public have no right to be, but which the man had taken because it saved him a certain number of yards in getting to his office.

It is almost the same class of test as that which was put by Lord Justice Kennedy, and which I quoted with approbation in the case of *Revie v. Cumming*, 1911, 48 S.L.R. 831, which we decided only about a week ago, namely this—Has the servant by this action increased the risks of his employment? Well, I think a man who instead of walking along the public road, which is the natural way to go, chooses to take a short-cut for himself along a railway line where the path is so near to the rails that he is liable to be knocked down by a passing engine does increase the risks, and that if something happens to him in that position the accident is not one which arises out of his employment.

Therefore I am of opinion that the learned Sheriff-Substitute here is in the right, and that we ought to dismiss the appeal.

LORD JOHNSTON—The evidence justifies, I think, the conclusion which the learned Sheriff-Substitute drew from it, and the questions fall to be answered accordingly.

The deceased went to Grahamston station on his employers' business, and he was still on his employers' business when returning. He did not turn aside to do business of his own. He must therefore be held, when he met the accident which resulted in his death, to have been in the course of his employment. But he did turn aside from his ordinary and proper road of return. Instead of keeping the high road, he climbed on to the railway line and walked along it. He was on a definite errand in his employers' service. Had he met with an accident incident to passage along any proper and ordinary route between Grahamston Station and his office—had he been run over, for instance, by a carriage or even by a motor bus or a traction engine—the accident would have been incident to his employment, and would therefore have arisen out of his employment. But when he went on to the railway line, he went to a place where he could not reasonably be while in the employment. An incident of his going there was the risk of being run over by a train. But that risk resulting in accident, that accident did not thereby become an accident incident to his employment. The accident which befel him was not therefore an accident which arose out of his employment, though it may have happened in the course of his employment.

LORD MACKENZIE—I agree with the view taken in this case by the Sheriff-Substitute. I think that the accident did happen in the course of the employment of the deceased, because he was making his way

from Grahamston Station back to his office in connection with his employers' business. I think it did not arise out of his employment. Instead of doing what the Sheriff-Substitute has found he could perfectly easily have done—gone along by the public road—he walked along the narrow path by the side of the railway line. It is found, as a matter of fact, that that part of the line is very dangerous. He had no right to be on the line. He had been warned by his superior not to go on the line. The path was, however, a little shorter than the public road.

The workman was on the line for a purpose of his own, and is not entitled to compensation.

LORD KINNEAR, who was present at the advising, was absent at the hearing.

The Court answered the first question in the affirmative and the second in the negative, and refused the appeal.

Counsel for the Appellant—D. Anderson—Aitchison. Agent—James A. B. Horn, S.S.C.

Counsel for the Respondents—Blackburn, K.C.—Wark. Agents—Hope, Todd, & Kirk, W.S.

Saturday, July 1.

## SECOND DIVISION.

WATSON AND OTHERS (MACGILLIVRAY'S TRUSTEES) v. MAXWELL (MACGILLIVRAY'S CURATOR) AND OTHERS.

*Succession—Faculties and Powers—Power of Appointment—Exercise of Power—Appointment of Strangers—Consent of Objects—Validity.*

A testatrix, who had under her father's settlement a power of appointment among her children of a share of his estate, directed her trustees to hold one-half for one of her sons in liferent, and on his death to divide it among his children.

Held that the exercise of the power, being invalid in respect of the introduction of strangers thereto, could not be rendered valid by the son's consenting to the exercise subsequent to the death of the testatrix.

*Mackie v. Mackie's Trustees, &c.*, July 4, 1885, 12 R. 1230, 22 S.L.R. 814, considered and distinguished.

*Succession—Will—Husband and Wife—Mutual Settlement—Revocability—Exercise in Settlement of Power of Appointment by Wife—Invalid Exercise—Right of Wife to Exercise Power by Codicil subsequent to Husband's Death.*

A wife, who had under her father's settlement a power of appointment of a share of his estate, executed along with her husband a mutual settlement