

able. [A further objection to a fee of seven guineas to senior counsel for the third day, and a fee of four guineas to his junior (the time occupied being only three hours) was not pressed].

Objection was also taken by the complainers to the following fees allowed by the Auditor to skilled witnesses, viz.—

1. James Hamilton, C E., Glasgow	-	£18	10	0
2. Joseph Dickinson, Manchester	-	23	3	0
3. Professor Gregory, Glasgow	-	163	3	6
4. Professor Kendall, Leeds	-	88	5	0
5. R. R. Tatlock, Glasgow	-	52	12	0
6. Dr Fawsitt, Glasgow	-	68	16	0
7. Dr Mellor, Stoke-on-Trent	-	85	19	6
8. W. Wade, Burslem	-	38	16	9

in respect of the number of days which the Auditor had allowed to these witnesses to prepare themselves for giving evidence, and the rate per day (viz., 6 gns.), and in the case of Professor Gregory also in respect of the sum (included in the above figure) allowed for his time occupied in consulting authorities in London. In place thereof they submitted that the witnesses ought not to have been allowed more than two days each for preparation, and that the rate should not have exceeded two guineas per day in addition to time occupied by travelling and attendance at Court.

Argued for respondents—Where, as here, the question was really one of taxation, the Court would not readily interfere with the Auditor's discretion, which had in this case been carefully exercised. The fees allowed were not excessive, for the case was both difficult and complicated, and involved an extensive acquaintance with its geological and mineralogical aspects. A knowledge of these conditions was vital, as each case now depended on its own facts—*North British Railway Company v. Budhill Coal and Sandstone Company*, 1910 S.C. (H.L.) 1, 47 S.L.R. 23. In the somewhat similar case of *Boyd & Forrest v. Glasgow and South-Western Railway Company*, 1911 S.C. 1050, 48 S.L.R. 876, larger fees had been allowed both for the proof and for the hearing on evidence and to three counsel. The fees allowed to the skilled witnesses had been fixed after careful consideration by the Auditor, who had taxed off £576 from the fees as originally charged. The value of these witnesses' testimony was in no way to be measured by the length of their evidence in Court, as much time and research had been expended by them in preparation.

At advising—

The opinion of the Court (the LORD PRESIDENT and LORDS KINNEAR, JOHNSTON, and MACKENZIE) was delivered by

LORD PRESIDENT—We have consulted with the Auditor upon this matter of the objections to his report on the question of the fees in this case.

The question of counsel's fees must, within certain limits, always be a question of degree, and they must be considered, not necessarily with a view merely to the day for which the fee is allowed, but with a view to remuneration upon the case as a whole. Now after seeing the Auditor

we have come to be of opinion that he has directed his attention to what I may call the particularity of the present case, and that it would be inadvisable to disturb the figures at which he has arrived for the remuneration of counsel.

Then so far as the witness fees are concerned, it was a case where we think that the fee objected to for the witness going to London to the British Museum was unavoidable. The question that was being mooted was not merely the state of scientific knowledge, but the state of scientific knowledge at a certain date. No man could be expected to be familiar with that, as part of what I may call his general professional information, and therefore it was a matter which necessitated special preparation. And inasmuch as it was admitted that the books required are—so far as this country is concerned—only in the British Museum, and as the British Museum could not come here, it was necessary for the gentleman to go to the British Museum.

Therefore we do not propose to disturb the Auditor's report.

The Court repelled the objections and approved of the Auditor's report.

Counsel for Complainers—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondents—Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, February 22.

FIRST DIVISION.

RODGER AND OTHERS v. SCHOOL BOARD OF PAISLEY.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—“Out of and in the Course of the Employment”—School Janitor Falling through Faintness and Striking Head on Pavement while Taking a Message.

A school janitor, while in the course of his employment taking a message from the headmaster to another headmaster, fainted in the street owing to the heat of the day, and fell backwards, striking his head on the stone pavement. He eventually died from the effects of the accident.

Held that the injury by accident did not arise out of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Annie Rodger, widow of William Rodger, and Alexander Rodger, Hugh Rodger, and Annie Rodger, children of William Rodger, appellants, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the School Board of the burgh of Paisley, respondents, and being dissatisfied with the determination of the Sheriff-Substitute

(LYELL) acting as arbitrator under the Act, appealed by way of stated case.

The Case stated—“(1) The deceased William Rodger, late husband of the principal appellant, was, for twenty-two years prior to his death on 24th June 1911, a workman in the employment of the respondents, as janitor at the North Public School, Paisley. (2) Shortly after 11 a.m. on 7th June 1911 the said deceased was sent, in the course of his employment, by the headmaster of the said school, to convey a message on business connected with the school, to the headmaster of Camphill School, Paisley, a distance of a mile and a half. (3) After delivering the said message, the deceased was returning to the North School via Storie Street, Paisley, between 12 noon and 1 p.m., and when opposite No. 14 Storie Street he stopped, and facing the wall of the said house, leaned his hands against it. (4) He then fell backwards, striking his head violently on the stone pavement. (5) The said fall caused injury to the brain, in consequence of which meningitis supervened, and the deceased died on the said 24th June 1911. (6) The deceased was 60 years old when he died, and prior to his injury by the said fall he enjoyed normal good health. (7) The weather in the town of Paisley and in the surrounding district on the said 7th June 1911 was very hot, the temperature recorded at Paisley Observatory being 75°6' at noon, and 76°8' at 2 p.m. (8) The cause of the deceased's fall was either giddiness or faintness brought on by the excessive heat of the day, acting upon a man of 60 years of age in normal health. (9) There was nothing in the nature of the deceased's employment that exposed him to more than the ordinary risk of weather conditions to which any person on the streets of Paisley was exposed between 12 noon and 1 p.m. that day. (10) All persons in the streets of Paisley and the surrounding district, whether in the course of their employment or not, were equally exposed at the time in question to the weather conditions which produced giddiness or faintness in the case of the deceased. In these circumstances I found further, in fact, that the deceased died from injury by accident occurring in the course of his employment, but found in law that the accident did not arise out of the employment in the sense of the statute.”

The question of law for the opinion of the Court was—“Was the Sheriff-Substitute right in holding that the accident did not arise out of the deceased's employment, in the sense of the statute?”

Argued for the appellants—They did not maintain, in view of *Robson, Eckford, & Company, Limited v. Blakey*, December 23, 1911, 49 S.L.R. 254, that heat apoplexy was an accident in the sense of the Act any more than frostbite—*Warner v. Couchman*, [1911] 1 K.B. 351, *aff.* 28 T.L.R. 58. But nevertheless the injury was “by accident,” for it was the proximate cause of the injury to the deceased that must be regarded, namely, the falling on his head; further, the injury was by accident arising

out of the employment. The reasoning in the cases of *Wicks v. Dowell & Company, Limited*, [1905] 2 K.B. 225, and *Owners of Ship “Swansea Vale” v. Rice*, 1911, 27 T.L.R. 440, applied, and they should be followed. The employment contributed to the accident by exposing the workman to one of the ordinary dangers of the street; it therefore arose out of his employment—*M'Neice v. Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15, which was followed in *Pierce v. Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997. As to the meaning of “accident arising out of,” reference was also made to *Moore v. Manchester Liners, Limited*, [1910] A.C. 498; *Refuge Assurance Company v. Millar*, 1912 S.C. 37, 49 S.L.R. 67; *Murray v. Denholm*, 1911 S.C. 1087, at 1102, 48 S.L.R. 896; *Warner v. Couchman (cit. sup.)*; *Kitchenham v. Owners of s.s. Johannesburg*, [1911] A.C. 417. The Lord President referred to *Challis v. London and South-Western Railway Company*, [1905] 2 K.B. 154, and *Fitzgerald v. W. G. Clarke & Son*, [1908] 2 K.B. 796.

Argued for the respondents—The injury was not by accident arising out of the employment. To satisfy these words there must be something in the employment which subjected the workman to some greater or more frequent risk than *quivis ex populo*—*Robson, Eckford, & Company, Limited v. Blakey (cit. sup.)*; *Warner v. Couchman (cit. sup.)*. This was fulfilled in *Wicks*, because his employment took the workman into a dangerous place.

At advising—

LORD PRESIDENT—In this case the deceased William Rodger, who was the husband of the principal appellant, was a janitor in the employment of Paisley School Board, at the North Public School at Paisley. On 7th June 1911 he was sent a message to the headmaster of another school in Paisley, distant a mile and a half. When in the course of returning from delivering that message he was attacked by faintness, and his faintness overcoming him, he fell, and his head came in contact with the street pavement, thereby causing an injury to his brain which brought on meningitis, from which he died. The question is whether he met with an accident arising out of and in the course of his employment.

Now I take it that there is no question that he had an accident—that is to say, that he had a fall—but the point is whether the accident arose out of and in the course of his employment. I think also there is no question that it arose in the course of his employment. He was discharging a part of his duty. But the point remains, was it an accident arising out of his employment? The Sheriff-Substitute finds two things. He finds that the weather was hot on that day. But it was not any very great heat. And he says—“There was nothing in the nature of the deceased's employment that exposed him to more than the ordinary risk of weather condi-

tions to which any person on the streets of Paisley was exposed between 12 noon and 1 p.m. that day," and "all persons in the streets of Paisley and the surrounding district, whether in the course of their employment or not, were equally exposed at the time in question to the weather conditions which produced giddiness or faintness in the case of the deceased."

In these circumstances I am of opinion that the accident did not arise out of his employment. There was a case the other day here—*Robson, Eckford, & Company, Limited v. Blakey* (*supra*, p. 81)—which is almost the same as the present, but it was ingeniously distinguished by counsel on the ground that in that case the accident, so to speak, was illness and nothing else. It was the effect of the illness which came upon him. Here it is said that the accident is really not in the faintness but is in the head injury which occurred by his striking the pavement, and I think that that is quite an understandable distinction. But the ground upon which I think it is quite clear that the man's accident did not arise out of his employment is that I do not think that his employment in any way subjected him to the particular class of accident in consequence of which he died.

I need not go through the cases again—we have been through them all very recently. But in one of them I suggested that it is helpful to contrast them by what I may call the interrogative method, and I think that if you employ that interrogative method it comes out very clearly. I contrast this case with the class of case of which the bicycle cases, both here and in England, are examples—*M'Neice v. Singer Sewing Machine Company, Limited*, 1911 S.C. 12; *Pierce v. Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997—and also with the hypothetical case I have put more than once in illustration—the case of the sandwichman. The danger of the streets to which the bicyclist and the sandwichman were subjected was the danger of being run over. I may also take another illustration from the judgment of Buckley, L.J., in the case of *Fitzgerald v. W. G. Clark & Son*, [1908] 2 K.B. 796, at p. 800; there may be a danger to which a man's employment specially subjects him which may consist not so much in the actual quality of the thing itself but in the constant recurrence of certain conditions—I mean the case that he puts of the railway guard. As he says, all of us travel by railway, and when we do so we are of course as much exposed to the risk of collision and hurt on that particular journey as the railway servant is, but then the railway servant goes every day and all the day, and we do not.

Therefore, putting it interrogatively, if you said "what is the class of injuries to which a railway guard's employment subjects him?" the answer would be, among other things, "a collision." In the same way with the sandwichman and the bicyclist, to what class of dangers are they subjected? The answer at once is "being run over." But if you said "to what kind

of danger does the janitor's employment (including in that employment having to go messages) expose him?" you might say "being run over in the street," but you would never say, I think, "the fact that, if he fell down, his head would hit something hard." He might have had this fainting fit in his own room and fallen against the fender, and he might on the other hand have fallen upon a soft rug in a room and upon some comparatively soft surface in the street.

And this case is entirely distinguished, I think, from the other class of case where the particular situation in which a man is put makes the fall more than usually dangerous, such as the case where the man was standing near the hold of a ship, being obliged to be there by his occupation, and fell down the deep hold and hurt himself. In that case the learned Judges put the illustration of the man being bound to walk, in the course of his employment, along the edge of a precipice. Now there is nothing of that sort here. This man was hurt in going along an ordinary street. It was absolute chance that the paving at that particular place, as it happened, was paving stone which cracked his head, and was not semi-liquid tar macadam which would not have hurt him at all.

Accordingly, applying that method of interrogation, I come without any hesitation here to the conclusion that this accident did not arise out of the man's employment, and accordingly I think the Sheriff-Substitute was quite right in his decision.

LORD KINNEAR—I am entirely of the same opinion. I can see no reason for saying that the Sheriff-Substitute has been guided, in answering the question of fact, by any wrong construction of the Act of Parliament. I think that is the only ground upon which we could have disturbed his judgment, because there is no question raised as to whether there were sufficient facts before him to justify him in deciding the question in the way he has done so far as it is a question of fact only.

Now I agree entirely with all that your Lordship has said. The counsel for the appellant argued, with great ingenuity, that all we have to look at is the immediate cause of the injury to this man, because the law, according to the dictum which is so often cited, does not judge the cause of causes; and accordingly it is said that when it has been ascertained that this man has died in consequence of his head being brought violently into contact with the stone pavement at a time when and in a place where he was engaged in his employment, everything has been proved that is necessary to satisfy the statute.

I think everything on that hypothesis has been proved that is necessary to satisfy the one condition of the statute that a man should be injured while he is in the course of his employment. But then it is necessary to go further in order to answer the other question which the statute proposes,

whether the man's injury was caused by accident, and whether, if it was an accident, it was an accident which arose out of his employment. Now these are words of ordinary language, and they have been construed so often that there can really be no difficulty in determining their meaning, whatever difficulty there may be—and it is often considerable—in applying them to the facts of the particular case.

I think it is now well settled that in order to satisfy that condition it must be shown that the injured man suffered in consequence of a risk incidental to his employment—that is to say, a risk beyond what ordinary people incur in the ordinary course of their business, but to which he was specially exposed by the nature of his employment. The illustration your Lordship takes seems to me to be an excellent one, because the extrinsic circumstances are so similar to the present—I mean the case of the man who was injured, in consequence of an epileptic fit, by falling into the hold of a ship. That was held to be an injury by accident arising out of his employment, because his employment made it necessary that he should be stationed at the edge of the hold, and therefore it exposed him to a risk, if he did faint, to which ordinary people are not exposed. It was exactly the case put by Collins, L.J., of a man being stationed, in consequence of his employment, on the edge of a precipice.

The other case cited in the course of the argument is an equally good illustration—the case of a man who was stationed, in consequence of his employment, in such a position as to expose him to a greater risk of being struck by lightning than ordinary people not employed at that place would be exposed to. But there is nothing exceptional in the cause of the injury in the present case at all. It is a risk which attends anyone whose business or pleasure takes him into the street—the risk of being injured if he be attacked by a fainting fit and fall. It is quite clear upon that statement that the faint had nothing to do with his employment, and I think the injury from falling was altogether out of relation to his employment also.

I come to the conclusion, therefore, that this poor man suffered from an accident to which all people are liable, and to which his own particular employment did not specially expose him.

LORD JOHNSTON—The deceased's death was occasioned by a fall in the street and the resulting personal injury while he was returning from conveying a message on the business of his employers. There can be no doubt therefore that he met with personal injury by an accident in the course of his employment. The accident was not merely the fall, but the violent contact between the pursuer's head and the stone pavement, which was part and parcel of the fall. The resulting personal injury was what is known as concussion.

The immediate cause, then, of the personal injury or concussion was the fall and

consequent blow. The immediate cause of the fall, and therefore the remote cause of the injury was giddiness or faintness; and the Sheriff-Substitute finds in fact that the immediate cause of the giddiness or faintness, and therefore the still more remote cause of the injury, was the excessive heat of the day, acting on a man of threescore in normal health. He has further found that in these circumstances the accident did not arise out of the man's employment. In this I entirely agree, as I think we are only concerned with the immediate or proximate cause of the personal injury.

We have had a good many cases cited, with the relative dicta of Judges, as to the dangers of the street in special reference to the Workmen's Compensation Act 1906. I refer to one of these, though it is in contrast to the present—*Wicks v. Dowell & Company, Limited*, [1905] 2 K.B. 225. The conclusion there came to was that the accident was occasioned by a fall—the fall by a fit. Dissociate the proximate cause, the fall, from the remoter cause, the fit, and the question remained, Did the fall and its consequent accident arise out of the employment? That was affirmatively answered, because the employment required the workman to work on the edge of the open hatchway of a vessel's hold. The risk of such a fall, whatever might be the cause of the fall, was a danger peculiarly incident to the man's employment. But a danger peculiarly incident to a workman's employment is in a different position from one which has no necessary connection with his employment, but is common to all or many persons irrespective of employment. Hence the value of the distinction between two other cases—*Andrew v. Failsforth Industrial Society, Limited*, [1904] 2 K.B. 32, where a man working on a high and exposed scaffold, and *Kelly v. Kerry County Council*, 42 I.L.T. 23, where a man working on the high road, were each struck by lightning. To be struck by lightning is a risk common to all, and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that the accident from such risk was an accident arising out of the employment. In *Andrew's* case, therefore, the accident was held to have arisen out of the employment; in *Kelly's* case not.

If, then, in the present case the fall is regarded as the proximate cause of the accident, it cannot, I think, be said that the fall of a pedestrian on the street is more incidental to one class of employment than to another, or more likely to occur to a workman than to his employer or any other passer-by.

I refer to the passage in Lord Salvesen's opinion in *Murray v. Denholm & Company*, 1911 S.C. at p. 1102, where he cites from the judgment in *Fitzgerald's case*, [1908] 2 K.B. 796. I accept it, therefore, that an accident to arise "out of" the employment, in the sense of the Act, must be an accident reasonably incident to the employment.

The accident in the present case cannot possibly come under that expression. To hold otherwise would virtually be to regard the expression "out of" only as a redundant alternative for "in the course of."

LORD MACKENZIE—I agree with your Lordship, and think that the Sheriff-Substitute has arrived at a sound conclusion in this case. I do not think it can be said that the part of the street on which the deceased was at the time of the accident was a place of danger, so that it could be said that he was then exposed to a peculiar risk which was reasonably incident to his employment; and therefore I am of opinion that the accident did not arise out of his employment.

The Court answered the question in the affirmative.

Counsel for the Appellants—Sandeman, K.C.—MacRobert. Agents—Fyfe, Ireland, & Company, W.S.

Counsel for the Respondents—Crabb Watt, K.C.—Moncrieff. Agents—Simpson & Marwick, W.S.

Wednesday, January 31.

FIRST DIVISION.

DUNDAS'S TRUSTEES v. DUNDAS'S TRUSTEES.

Revenue—Succession—Settlement Estate Duty—Incidence of Duty—Property Settled by Father in Son's Marriage Contract—Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 5 (1)—Finance Act 1896 (59 and 60 Vict. cap. 28), sec. 19 (1).

Held (diss. the Lord President) that when a father becomes a party to the marriage settlement of a child and covenants to pay at his death a certain sum to the marriage-contract trustees, the latter, and not the father's testamentary trustees, have to bear the settlement estate duty.

In re Maryon Wilson, [1900] 1 Ch. 565, followed.

Marriage Contract—Construction—Property Settled by Father in Son's Marriage Contract—Incidence of Death Duties.

A in his son's marriage contract bound and obliged himself, his heirs, executors, and successors, to make payment to the marriage-contract trustees "at the first term of Whitsunday or Martinmas after his death of the sum of £3750, or such other sum, more or less, as with the . . . capital sum of £20,000 and the . . . sum of £6250, more or less, . . . shall make up the sum of £30,000 to be received by the trustees, and which sum the said" A thereby undertook and guaranteed to "make up" to the trustees. *Held* that, on a fair construction, the marriage contract did not bind the father's testamentary trustees to make good a total sum of £30,000 free of all Government duties.

Expenses—Special Case—Construction of Statute.

In a Special Case brought to determine a question as to the incidence of death duties arising out of an obligation undertaken in a son's marriage contract, but turning mainly on the construction of a statute, the parties upholding the wrong construction were found liable in expenses.

The Finance Act 1894 (57 and 58 Vict. cap. 30), section 5 (1), enacts—"Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(a) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied. . . ."

The Finance Act 1896 (59 and 60 Vict. cap. 28), section 19 (1), enacts—"The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

Robert Nevill Dundas, W.S., Edinburgh, and John Ramsay Anderson, W.S., Edinburgh, testamentary trustees of the late Sir Robert Dundas of Arniston, Midlothian, Baronet, *first parties*, and the said Robert Nevill Dundas, and others, trustees acting under the antenuptial contract of marriage of Captain Henry H. P. Dundas (afterwards Sir Henry), the then younger son of Sir Robert Dundas, and Lady Beatrix Home, second daughter of the Earl of Home, *second parties*, presented a Special Case for the opinion and judgment of the Court of Session.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"The late Sir Robert Dundas was a party to the marriage contract of his son Henry, now Sir Henry.

"The said marriage contract recites that it was part of the treaty for the marriage that a sum of £30,000 on behalf of Henry should be vested in the marriage-contract trustees, and goes on to mention that the said sum is made up of (1) securities and cash to the extent of £20,000, presently paid over; (2) the share of the funds in the marriage contract of Sir Robert which has been apportioned to Henry (these amounted at date to £6250 or thereby); and (3) an obligation by Sir Robert to pay the sum of £3750, or such other sum, more or less, as should make up the sum of £30,000.

"The reason why the sum in the obligation of Sir Robert could not be precisely specified was because the marriage-contract funds under his (Sir Robert's) marriage contract were still held by trustees and were not payable to the children of the marriage until Sir Robert's death, as he enjoyed the life interest. Sir Robert had by deed of even date irrevocably apportioned in favour of Henry one equal fourth share