with the judgment proposed by your Lordship.

LORD SKERRINGTON—I had some difficulty about this case during the discussion, but what has fallen from your Lordships has removed my doubts and I therefore concur.

The Court answered the question in the case in the affirmative.

Counsel for the Appellant—W. T. Watson. Agent—Alex. Ramsay, S.S.C.

Counsel for the Respondent—Blackburn, K.C.—M. P. Fraser. Agents—Russell & Dunlop, W.S.

COURT OF SESSION.

Thursday, December 5.

SECOND DIVISION.

[Sheriff Court at Ayr.

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

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—Evidence—Onus of Proof—Unexplained Drowning of Ship's Cook—Inference.*

Circumstances where the Court recalled the award of the arbiter and *held* (*diss.* Lord Guthrie) that a claimant under the Workmen's Compensation Act 1906 had failed to discharge the *onus* of proving that the unexplained drowning of a ship's cook who had disappeared from a vessel lying in harbour, and whose body was found in the water next day, was due to an accident arising out of his employment.

Bender v. *Owners of s.s.* "*Zent*," [1909] 2 K.B. 41, and *Marshall* v. *Owners of s.s.* "*Wild Rose*," [1910] A.C. 486, 48 S.L.R. 701, *followed.*

Mackinnon v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299, *distinguished.*

Opinion (*per* Lord Guthrie) that the decision of the arbiter on the facts held proved, although wrong, was reasonable and therefore final.

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, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

Mrs Lendrum, Ayr, *respondent*, claimed compensation under the Workmen's Compensation Act 1906 from the Ayr Steam Shipping Company, Limited, Ayr, *appellants*, for the death of her husband Edward Lendrum, who was drowned in the harbour of Larne on 16th December 1911. The Sheriff-Substitute (Shairp), as arbiter, found her entitled to compensation, and the company appealed to the Second Division of the Court of Session by way of Stated Case.

The Case set forth—"The following *facts* were admitted or proved, namely—that the deceased Edward Lendrum was on 16th December 1911, and had been for some time previous to that date, employed by appellants as a cook and steward on their steamship 'Turnberry'; that on the morning of the said 16th day of December 1911 the 'Turnberry' was lying in the harbour of Larne; that the said now deceased Edward Lendrum served the crew of the ship with breakfast in the usual way; that the crew thereafter rested, having been working on the previous night; that the ship was to sail at six o'clock p.m. on said 16th December 1911; that the said deceased Edward Lendrum, after having served breakfast as aforesaid, had no meal to prepare or serve till shortly before the sailing of the ship; that it was customary for him to rest in the afternoons, especially on Saturday afternoons, as his work on Friday evenings was usually heavy and prevented him from obtaining sufficient sleep; that he slept in a bunk in a small ill-ventilated room entering directly from the saloon of the ship; that the said room and saloon were both on deck, and that in going from his room, or from the saloon, to the deck, the said Edward Lendrum would pass a lavatory, situated at the door leading from the saloon, which lavatory was the one used by Lendrum while aboard the said ship; that the captain of the ship, John M'Donald, about 4 o'clock p.m. on said 16th December 1911, went to the saloon and told the said now deceased Edward Lendrum, whom he saw lying in his bunk, to prepare and serve tea for the crew before the ship sailed; that Lendrum just turned in his bunk and looked at the captain, but made no reply to him, and that the captain then returned to his own room; that the captain afterwards sent the chief officer of the ship, John M'Innes, to see if Lendrum was getting the crew's tea ready, and that M'Innes shortly afterwards reported to the captain that he could not find Lendrum in the ship; that the captain and chief officer then (about 5·30 p.m.) went and looked in Lendrum's bunk, and saw that he was not in it; that they found some of his clothes on a settee in the saloon, and his purse and watch lying by themselves in the saloon, but away from the clothes; that Lendrum's disappearance from the ship was at once reported to the police, and his dead body dressed in his day underclothes was next day found in the sea at a point between the place where the stern of the ship had been on 16th December 1911 when Lendrum disappeared and a slip situated a short distance from where the stern of the ship had been; that Lendrum was drowned, and his dead body bore no marks of violence to account for his death otherwise; that he was a good-tempered sociable man, and pleasant to deal with, always able to do his work, and

never seen by the captain of the ship to be the worse of intoxicating liquor, though he was not a teetotaller; that he was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship; that his son Edward Lendrum, who frequently sailed with his father in said ship, and to whom his father's tendency to sickness was well known, immediately on hearing of his father's death, expressed the opinion that he had fallen overboard while vomiting; that in March 1911 a shortage of £3, 14s. 6d. was found in the liquor stock under the charge of the said deceased Edward Lendrum, but by an arrangement with his employers said sum was being gradually paid back by him, with the result that after his death it was found that on balancing accounts between the deceased and his employers there was a debit balance against him of only 11s. 1d.; that once, when the ship was lying in Ayr Harbour, he was seen hanging over her side by a rope which was fastened to the ship's taffrail and was round his waist; that he was holding on to the rope with both of his hands held above his head and that he was not in the water; that he afterwards explained to his son Edward that he was trying to recover a towel which had fallen overboard; and that he did not commit suicide.

"I accordingly, taking into consideration the whole facts admitted and proved, drew the inference in fact that, between 4·30 and 5·30 p.m. on 16th December 1911, the said now deceased Edward Lendrum left his bunk in the said steamship 'Turnberry,' went on deck, and accidentally fell overboard and was drowned, and I held that said accident arose out of and in the course of his employment as a cook and steward on board said ship.

"I therefore found the appellants liable to the said Mary Kerr or Lendrum in compensation under said Act.

"The *question of law* for the opinion of the Court is—Whether on the facts admitted and proved the arbiter was justified in holding that the deceased Edward Lendrum met his death as aforesaid by accident arising out of and in the course of his said employment?"

On 29th October 1912, the case having been partly heard, the Court remitted it back to the arbiter to answer the following questions, viz.—"(1) The facts as to the clothes which the deceased was wearing when he was lying down in his bunk on the last occasion when the captain saw him alive. (2) The facts as to the clothes which the captain found in the saloon after Lendrum was missed, and whether there were any of deceased's clothes in the saloon when the captain went to wake him. (3) Whether it was proved that six empty whisky bottles of another kind than those supplied by the ship were found under the deceased's mattress, and whether it was proved that the deceased's bunk had been overhauled eight days before his death and that there were no whisky bottles there then. (4) Whether it was proved that there was a shortage of 18s. 3d. referable to the eight days during which the vessel had been running since her overhaul, this shortage being subsequent to that referred to in the case stated by the arbiter, and discovered after the deceased's death. (5) What in fact was proved as to the height and construction of the bulwarks of the vessel, and the height of the deceased. (6) Was a plan produced and proved as part of the facts of the case? *Note.*—If No. 6 is answered in the affirmative, the Sheriff Clerk will transmit the plan for the use of the Court."

On 8th November 1912 the arbiter reported as follows:—"(1) That on the last occasion when Captain M'Donald saw the deceased Edward Lendrum alive, and lying in his bunk, he (Lendrum) had his waistcoat on, but the captain could not say whether Lendrum had on his trousers or not as the lower part of his body was covered with the bed-clothes, nor was the captain able to say whether or not Lendrum had his coat on; (2) that after Lendrum was missed there were found in the dining saloon of the 'Turnberry,' on a settee, Lendrum's jacket, waistcoat, trousers, cap, necktie, collar, boots, purse (containing a few coppers), and watch, the purse and watch not being in the pockets of the clothing, but that there was no underclothing, and that none of the above enumerated articles of clothing were observed in the dining saloon by Captain M'Donald when he went previously to wake Lendrum; the clothes when found were not folded up, just thrown off; (3) that it was not proved that six empty whisky bottles of another kind than those supplied by the ship were found under the deceased's mattress, nor was it proved that the deceased's bunk had been overhauled eight days before his death and that there were no whisky bottles there then; (4) that it was not proved that there was a shortage of 18s. 3d. in the stock of liquor controlled by Lendrum referable to the eight days, 8th to 16th December, during which the 'Turnberry' had been running after her overhaul, but that it was proved by the admission of the defenders' cashier that on an accounting only the sum of 11s. 1d. was due to the company by Lendrum at the date of his death; (5 and 6) that the height and construction of the bulwarks of the 'Turnberry' are shown on a plan produced by the pursuers at the proof on 15th May 1912, the accuracy of which plan was admitted by the agents of the parties, and that it was proved that Lendrum was five feet six inches in height. The said plan accompanies this report, and shows the half rounds where Lendrum was seen vomiting on two occasions previous to his death."

Argued for the appellants—In Workmen's Compensation cases there was an *onus* on the claimant to show that the accident arose out of the employment of the workman—*Barnabas* v. *Bersham Colliery Company*, November 9, 1910. 48 S.L.R. 727. The respondent had not discharged

the *onus* because the cause of the accident was purely conjectural. It was not necessary for the appellants to show that it was a case of suicide. It was enough for them that the cause of the accident was unexplained—*Marshall* v. *Owners of s.s.* "*Wild Rose*" [1910], A.C. 486, 48 S.L.R. 701; *Bender* v. *Owners of Steamship* "*Zent*," [1909] 2 K.B. 41; *Burwash* v. *F. Leyland & Company, Limited*, July 18, 1912, 5 B.W.C.C. 663.

Argued for the respondent—The facts showed that the accident arose out of the employment of the deceased—*Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299; *Swansea Vale (Owners)* v. *Rice*, [1912] A.C. 238, *per* Lord Shaw at p. 241, 48 S.L.R 1095, at p. 1096; *Lee* v. *Stag Line, Limited*, July 17, 1912, 5 B.W.C.C. 660. The question for the Court was not whether the decision of the arbiter was right or wrong, but whether there was evidence on which he could reasonably have arrived at the decision he did—*Euman* v. *Dalziel & Company*, 1912 S.C. 966, *per* Lord President at p. 968, 49 S.L.R. 693 at p. 694. The present case was different from those cited by the respondents with the exception of *Burwash* v. *F. Leyland & Company, Limited*, *cit. sup.*, because in those cases the workman was off duty, while in this case he was engaged at his work. In *Marshall* v. *Owners of s.s.* "*Wild Rose*," *cit. sup.*, although the Court held that the accident did not arise out of the employment, there was sufficient evidence to warrant an inference that an accident had occurred.

LORD DUNDAS—This case, which relates to the unexplained drowning of a seaman, is, I think, both an important and a difficult one. The facts as found by the learned arbiter are not in all respects as complete and specific as one would desire, even after a remit to and report by him upon certain points. The material facts may be summarised as follows:—On the crucial date, 16th December 1911, the now deceased Edward Lendrum was and had been for some time employed as cook and steward on the appellants' steamship "Turnberry," which on that day was lying in the harbour of Larne. She was to sail at 6 p.m. The deceased was, as customary, resting in his bunk in the afternoon. It was a small ill-ventilated room on the deck level adjoining the saloon. The men's lavatory was on the same level and close by, as shown on the admitted sketch plan. About 4 p.m. the captain told Lendrum, whom he saw lying in his bunk, to prepare and serve tea for the crew before the ship sailed. Lendrum turned and looked at the captain, but made no reply. He had his waistcoat on, but the captain cannot say whether his coat and trousers were on or not. About 5·30 the chief officer was sent to see if Lendrum was preparing the tea and reported that he could not find him on the ship. The man was never afterwards seen alive. His coat, waistcoat, trousers, cap, tie, collar, and boots, and his purse (containing a few coppers) and watch were found by the captain and chief officer on a settee in the saloon. The clothes were not folded, just thrown off. None of the articles named were observed in the saloon by the captain when he went to Lendrum about 4 o'clock. The body, clad in underclothes, was found next day in the sea near where the "Turnberry" had been lying. The man was drowned, and there were no marks of violence on the body. He was a good-tempered, sociable, pleasant man, and sober though not teetotal. He was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship; but the case does not state whether these attacks of sickness occurred at sea only or also when the ship was in harbour, nor are any dates given even approximately of any of the attacks. There had been in March 1911 a shortage in the liquor stock under Lendrum's control, but the sum (£3, 14s. 6d.) was, by arrangement, being gradually paid back by him, and the debit balance had been reduced to 11s. 1d. A strange episode is stated, for which no date is given, when Lendrum was seen hanging over the ship's side, suspended by a rope round his waist, and explained that he was trying to recover a towel. The arbiter finds that he did not commit suicide. The ship's rail was 3 feet 5 inches above the deck. Lendrum's height was 5 feet 6 inches.

The learned arbiter has awarded compensation to the dependants. I have come to the conclusion, for reasons to be stated, that his award cannot stand; but before dealing with these I shall make some observations upon the law and authorities bearing on the case. During the discussion counsel for the parties judiciously limited their citation of reported cases to six, which they seemed to be agreed—and so far as I see they were right—are the most nearly in point to the present case. These were—*Mackinnon* v. *Miller*, 1909 S.C. 373; *Swansea Vale* v. *Rice*, 1912 A.C. 328; *Lee* v. *Stag Line Company*, July 17, 1912, 1 Gordon's W. Comp. Rep. 398; *Bender* v. *Zent*, 1909, 2 K.B. 41; *Marshall* v. "*Wild Rose*," 1909, 2 K.B. 46, *affd.* 1910 A.C. 486; and *Burwash* v. *Leyland & Company*, July 18, 1912, 28 T.L.R. 546, 1 Gordon's W. Comp. Rep. 400. In the first three of the cases the decision was in favour of the applicants; in the remaining three, in each of which the Court differed from the arbitrator, the decision was in favour of the employers.

Mackinnon v. *Miller* is, I think, much the strongest case in favour of the applicant. Miller, an engineer on board a steam tug which lay moored to the jetty at Kinlochleven, was last seen alive about 5 a.m. on 15th February 1908, asleep in his bunk. An hour later he was missed. His working clothes were lying beside the bunk. His body, clad in nightdress, was recovered two days later in the sea, close by where the tug had been lying. Suicide was negatived. The Sheriff-Substitute awarded compensation, and the Court declined to interfere with his conclusion. The Lord President pointed out that though there was no direct testimony, there was nothing

antecedently wrong in saying one might come to a certain inference although that inference was only based on circumstantial evidence—"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." The Sheriff-Substitute had drawn an inference in which the Court thought there was nothing violent and they would not disturb his conclusion. It is fair to observe that *Miller's* case was prior in date to the decision by the House of Lords in *Marshall* v. "*Wild Rose*," which I think stands as the leading authority on this matter. Upon the other hand, in the later case of *Swansea Vale* Lord Shaw said—"I see no occasion to differ from, but much to incline me to agree with, the judgment in the case of *Mackinnon* v. *Miller*, and in particular with the judgment of Lord Dunedin." I do not at all suggest that *Mackinnon* v. *Miller* was wrongly decided. But, after all, the decision in each of these cases must depend upon its own facts; and there were facts in that case, *e.g.*, that the height of the ship's rail was only 20 inches, and the existence, as the report discloses, of various obstacles or stumbling-blocks upon the deck, which differentiate it from the present case. *Swansea Vale* v. *Rice* was, I think, a comparatively simple and plain-sailing case upon its facts. Rice was first mate upon a voyage from Greenock to Algiers. At 4 a.m. he complained to the captain of being sick and giddy, took a dose of castor oil, and went on deck to keep his watch (4 to 8 o'clock). He was not seen after 7 a.m. The County Court Judge awarded compensation, and the Court of Appeal and House of Lords upheld his decision. There was more than mere conjecture to proceed upon. This sick officer when last seen was on active duty discharging a responsible office. As Lord Shaw put it—"A man engaged in a variety of duties is sent in a sick and giddy condition to perform these duties and into a position of danger." The third case is *Lee* v. *Stag Line Company*. Lee was engaged as ship fireman on a voyage in the Tropics. He was new at the work. He was put on duty one night from midnight to 6 a.m., which was longer than his usual watch (12 to 4), owing to the illness of another fireman. About 4·45 a.m. he was missed, and he was never seen again. Shortly before he had been seen on deck getting a drink. It was proved that the firemen while on duty were in use to go on deck for fresh air. The ship's rail was 3 feet high; the deceased was 6 feet in height; the ship was given to rolling and was rolling slightly that morning. The County Court Judge drew the inference that Lee died as the result of an accident arising out of and in the course of his employment, and the Court of Appeal held that there was evidence to justify this inference. Cozens-Hardy (M.R.) observed—"It was usual—I think I may say necessary—in the Tropics to come on deck for fresh air. That makes all the difference. Although the man's regular duty was in the stokehole, he was really acting equally in the discharge of his duty in coming on deck." I come now to the cases in which the applicants were unsuccessful. The first in date is *Bender* v. *Zent*, which on its facts affords a sharp contrast with the case of *Lee*. While a steamship was on the high seas, the chief cook and baker (Bender) was lost overboard; the weather was fine, the ship steady, and there was a 4-foot rail and bulwark all round. The man was last seen about 5·35 a.m. The County Court Judge awarded compensation, but the Court of Appeal took the opposite view. The Court fully recognised, as did Lord Dunedin in *Mackinnon* v. *Miller*, the competency of drawing an inference from facts that an accident arose out of as well as in the course of an employment, and though no direct testimony is available. But the *onus* is always upon the applicant, and none the less so although by the workman's death a greater burden is thrown on his dependants. The facts afforded ground for conjecture, but did not warrant the inference which the County Court Judge drew from them. Only three days after the judgment in *Bender* v. *Zent* the same Court decided the important case of *Marshall* v. "*Wild Rose*." The rubric, which seems to be fully borne out by the opinions, bears broadly that "the unexplained drowning of a seaman engaged on board ship does not of itself raise any presumption that his death was the result of an accident arising out of as well as in the course of his employment so as to entitle his dependants to compensation under the Workmen's Compensation Act 1906." Lord Moulton (then L.J.) said—"The point is a very important one, and I hope it will go to the highest tribunal so that we may have directions upon it. It may be expressed in a very few words—Is the unexplained drowning of a sailor by falling from his ship when at sea a sufficient *prima facie* case for compensation?" The facts of *Marshall's* case were brief and scanty, He was second engineer on a steam trawler lying in Aberdeen harbour; he came on board one evening at 10 o'clock; steam was to be got up by midnight; he went below and undressed himself, excepting shirt, trousers, and socks; he came up on deck later, saying to the chief engineer that he was going for a breath of fresh air; it was a very hot night. He was missed at midnight; and his body was found next day in the sea just under the rail on the starboard quarter, where the men were in the habit of sitting in hot weather. The County Court Judge awarded compensation, but the Court of Appeal and a majority of the noble and learned Lords took the opposite view. Lord Shaw, one of the majority, pointed out that "the name of inference may be apt to be given to what is pure conjecture"; that there was no room for anything but conjecture as to what Marshall did or what befell him after he came up on deck that night, and that,

assuming his death to have been due to an accident arising in the course of his employment, there was no ground for any inference that it arose out of the employment. The latest of the six cases to which we were specially referred is that of *Burwash*, which was decided by the Court of Appeal contemporaneously with *Lee* v. *Stag Line Company*. The facts in *Burwash's* case were remarkably like those now under consideration, but were in several respects more favourable for the applicants, yet the decision was against them. A ship's cook disappeared while the vessel was at sea. When last seen he was at his work in the galley, where there was no possibility of his falling overboard. He was suffering from a disease which caused him to go frequently to the lavatory, and to reach it he had to go on to the open deck at a point 8 feet from the ship's rail, which was 3 feet 7 inches high; it was dark at the time, and the ship was rolling. The County Court Judge awarded compensation, but the Court of Appeal allowed the appeal. Cozens Hardy, M.R., observed that "there is no evidence to show how the cook got out of his galley in the course of his duty, and no evidence from which it can be inferred how the man went into the sea," and added that "the case is not beyond the region of surmise." Farwell, L.J., treated the matter as "really a pure case of guesswork." Kennedy, L.J., said—"It is a mere matter of conjecture. The man was lost in the sea by drowning and we know nothing more than that." After alluding to *Bender* v. *Zent*, his Lordship went on to say—"The proof certainly lies upon the dependants, but here there is nothing to show how the man came to leave the galley. If he did leave the galley justifiably he was never seen. With reluctance I feel myself obliged to say that the inference we are asked to draw here goes beyond anything justified by the circumstances which existed at the time." The case of *Burwash*, if rightly decided, as I think it was, affords a direct and strong authority adverse to the present applicants.

The weight of the authorities now reviewed seems to be in favour of the employers in the case before us. I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment; (2) that such proof need not be by direct but may be by circumstantial evidence, but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise, or probability; and (3) that an award by an arbiter cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them. Now when one turns to the facts of this case, the precise cause of Lendrum's death is left in mystery and darkness. I think there are legitimate grounds for at least a suspicion of suicide. The man leaves his bunk, and is found drowned; he has divested himself of his upper clothing, part of which he certainly had on when last seen, and leaves it, and his purse and watch, in the saloon; and if he had occasion to be sick, the lavatory was nearer to his bunk than the ship's side. But the Sheriff-Substitute negatives suicide, though it does not appear how he reached that inference from the facts as disclosed. Leaving suicide out of account, I do not say that the arbiter might not reasonably infer that death was due to an accident arising in the course of the employment. But the question is whether he could so infer accident arising out of the employment. I am unable to hold that he could. The *onus* is on the applicant in that matter; and I can see nothing in the facts which could warrant the inference. The facts here are no stronger, to my thinking, than those in *Marshall* and in *Bender*, and less strong than those in *Burwash*. Mr Moncrieff urged that the last known fact before Lendrum's disappearance was the captain's order to him to prepare tea; that he was thereafter a man on active duty; that in all probability he was, while engaged on that duty, taken sick, and while vomiting fell over the side and was drowned. But the sickness is absolutely conjectural. I am not clear that in any case one could hold that being sick over the side was an act springing from or caused by his employment, so that a fall overboard while vomiting could be said to be an accident arising out of the employment. A case might occur where a cook, engaged in his duty, was forced by the motion of the vessel to leave his work and vomit over the side; and I could understand in such a case an inference that his consequent fall overboard was an accident arising out of his employment; but there is no case of that sort here. It is enough, however, as I think, that the suggestion of sickness and its hypothetical consequences is here entirely in the region of guess and surmise and conjecture. In my judgment, therefore, the Sheriff-Substitute could not competently draw an inference from the facts found that the accident (assuming there was an accident) arose out of the employment of the deceased. That view, if correct, would dispose sufficiently of the case. But I may add that, looking to the peculiar way in which the Sheriff-Substitute's conclusion is expressed, I am not satisfied that he intended to draw the inference which the applicants suppose him to have drawn. The inference in fact which the arbiter says he drew is merely that Lendrum left his bunk, went on deck, accidentally fell overboard, and was drowned. He then goes on to say—"And I held that said accident arose out of and in the course of his employment." It looks to me as if the Sheriff-Substitute had overlooked the distinction between "out of" and "in the course of," and the necessity for establishing both points in order to entitle an applicant to compensation. What the arbiter says he infers in fact might warrant him in holding that there was an accident in the course of the employment; but it would not, I think, justify the further con-

clusion that it arose out of the employment. It appears to me that, having drawn his inference in fact, he proceeded to deduce a conclusion in law which the inference in fact was not sufficient to support. But whether or not this interpretation of the Sheriff-Substitute's conclusion is the correct one, it seems to me that his award cannot be sustained, and that the question put to us must be answered in the negative.

LORD SALVESEN—The late Edward Lendrum, whose death has given rise to the present proceedings, was employed by the appellants as a cook and steward on board their steamship "Turnberry." The vessel was lying in the harbour at Larne on Saturday, 16th December 1911, and was timed to sail at 6 p.m. As he had been working late on the previous night, and had no duties to perform between breakfast time and a couple of hours before sailing, Lendrum had spent part of the day (we are not told how long) in his bunk, and he was lying there at 4 p.m. when the master called him to prepare and serve tea for the crew before the ship sailed. On being so called Lendrum just turned in his bunk and looked at the captain, but made no reply. Some time later the captain sent the chief officer, M'Kinnon, to see if Lendrum was getting the crew's tea ready. M'Kinnon did so, and reported that he could not find Lendrum in the ship, and about 5·30 both the captain and chief officer made a search for him but failed to find him. His bunk was empty, but on a settee in the saloon were found his jacket, waistcoat, trousers, cap, necktie, collar, boots, purse, and watch—the purse and watch not being in the pockets of the clothing. The clothes when found appeared to have been thrown off, and had not been observed by the captain when he passed through the saloon, but the captain had noticed that he had his waistcoat on when he was lying in his bunk, the lower part of his body being covered with the bedclothes. His disappearance was duly reported to the police, who found his dead body dressed in his day under-clothes next day in the sea at a point between the place where the stern of the ship had been on 16th December and a slip situated a short distance away. Lendrum's death was due to drowning, and his dead body bore no marks of violence. From these facts the Sheriff-Substitute drew the inference that Lendrum between 4·30 and 5·30 went on deck and accidentally fell overboard and was drowned; and he also held that Lendrum's accident arose out of and in the course of his employment as a cook and steward on board appellants' ship. The question of law is whether he was justified in so holding.

There are only three possible ways by which to account for his death—foul play, suicide, or accident. Foul play is out of the question, and as to suicide the facts proved do not seem to me to justify an inference that he took his own life. It is expressly found that he was a good-tempered social man, pleasant to deal with, and was never seen by the captain to be the worse of intoxicating liquor although he was not a teetotaler. On the other hand, it is proved that there had been a shortage in the liquor stock under his charge of £3, 14s. 6d. in March 1911; but by an arrangement with his employers this sum was being gradually paid back, with the result that at the time of his death he was only due them 11s. 1d. There was therefore nothing in his relations with his employers which would lead him to take his own life. On the other hand, it remains a mystery why he should have removed such parts of his clothing as he had on when in his bunk and taken the remainder of his clothes to the saloon. It was suggested that as his own bunk was small and ill-ventilated he had taken his clothes there to dress in greater comfort. This of course is possible, but does not explain why he should have removed the waistcoat which he had on while in his bunk. If he was intending to drown himself he might perhaps, before going on deck, divest himself of his clothes and leave such valuables as he had behind, or if he had become suddenly deranged his actings might be accounted for. In the course of performing his duties in preparing tea for the crew he would naturally first dress himself, and there would seem to be no occasion why he should divest himself of such of his day clothing as he already had on. Counsel for the respondent suggested that he had taken off his trousers before lying down, and might require to remove his vest in order to put on his braces. This seems on the face of it extremely improbable, more especially as braces did not form part of the clothing which he left behind. His conduct in removing his clothes is certainly mysterious, but having in view all the circumstances I do not think any inference can be drawn that he met his death by his own wilful act. The Sheriff-Substitute has found in fact that he did not commit suicide, by which I suppose he means that there was no evidence from which he could reasonably draw the inference that he had done so. If that is the meaning of the finding I am prepared to assent to it, because, although the possibility of suicide has certainly not been excluded, the presumption is the other way.

The last alternative is that he met his death by accident, and difficult as it is to figure what kind of accident could have happened to him under the circumstances, I hold that the probabilities point in that direction. The theory presented by the respondent was that he had suddenly felt an attack of sickness coming on, that he had rushed on deck to vomit over the side of the ship, and that in so doing he had overbalanced and fallen. It is possible that this happened, although I cannot say there are any facts found which make it probable. It is true that on several previous occasions he had been seen vomiting over the side of the ship, but it is not said how long before his death he was last so

seen, nor whether such vomiting took place while he was at sea. There is no finding that during the day of the accident or even during the last voyage of the "Turnberry" he had complained of sickness or shown any symptoms of indisposition. He had gone about his duties in the morning apparently in the ordinary way, and had been idling or resting the rest of the day. He must have understood the captain's message or he would not have got up, and as there was a lavatory close to the saloon in which he could conveniently have been sick, it is difficult to understand why he should have passed the door of this lavatory and gone out in his stocking soles on to the deck of the vessel on a December afternoon when it must have been perfectly dark. Further, as the rail of the vessel over which he is supposed to have leaned was 3 feet 5 inches above the deck, and Lendrum was a small man—5 feet 6 inches in height—it is not easy to understand how he could have overbalanced even if he had had a paroxysm of sickness. A slip on the deck or a stumble would not account for his falling overboard, although he might well have stumbled in the dark. The circumstances of his disappearance appear to me to be wholly wrapped in mystery.

Assuming, however, that Lendrum accidentally fell overboard, has the respondent proved that this accident arose out of his employment? As cook and steward he had no occasion to go near the sides of the vessel. At the time in question his duties would require him to be in the saloon and in the galley or between the two, but he could scarcely have been in the performance of his duty in the attire in which his body was found. If it had been affirmatively proved or could be reasonably inferred that he did rush to the side of the ship in order to vomit, and had thus fallen overboard, I should have been prepared to hold that the accident had arisen out of his employment; but when one comes to theorise on the manner in which he met his death one is in the region of pure conjecture. All that can be affirmed is that his falling overboard is entirely unexplained, and the theory of the respondent seems to be just as improbable as any other theory which might be suggested on the other side. That the man sometimes did eccentric things is proved by the fact that on one occasion he was observed hanging over the side by a rope fastened to the ship's taffrail and round his own waist, and that on that occasion he was holding on to the rope with both hands held above his head. The explanation that he afterwards gave to his step-son, that he was in this way trying to recover a towel which had fallen overboard, does not make his conduct much more rational. The case therefore seems to me to fall within the category of which *Bender* ([1909] 2 K.B. 41) and *Marshall* ([1910] A.C. 486) are excellent illustrations. In the latter case Lord Shaw of Dunfermline said—"What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One can infer nothing, all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment or in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it?" Each of these pertinent questions can be put with equal force here. Indeed in *Marshall's* case there was a greater probability that the man had fallen overboard while sitting on the top of the bulwarks than that he met his death in any other way. I adopt the answer of the learned and noble Lord in that case as applicable to the present when he says—"There can be in my view nothing dignified with the name of an inference on this subject, but again only conjecture."

We were referred to the decision of the First Division in the case of *Mackinnon* (1909 S.C. 373), and counsel for the respondent argued that the facts there were no more convincing than in the present, and yet that the Court had refused to disturb the finding of the arbitrator in favour of the workman's dependants. There was, however, one important fact in that case which made the likelihood of an accidental falling overboard much greater than in the present, namely, that the bulwark was only 20 inches in height, whereas the rails of the "Turnberry" were 3 feet 5 inches, or more than twice the height. In its facts the present case much more closely resembles those which were held by the Court of Appeal not to entitle them to draw the inference that the cook of the "Zent" had met with an accident arising out of his employment. The Sheriff-Substitute has made no finding that the accident which he infers Lendrum met with arose out of his employment. Indeed, as I read his statement, he seems to have assumed that it was enough to reach that conclusion because Lendrum fell overboard while in the course of his employment. In short, he has not adverted to the distinction that was so clearly pointed out by the judges who decided the cases of *Bender* and *Marshall*. In my opinion there are no facts from which an inference can reasonably be drawn that the accident—assuming it to be proved—arose out of Lendrum's employment. I am therefore for answering the questions of law put to us by the arbitrator in the negative.

LORD GUTHRIE—It is admitted that the deceased Edward Lendrum was drowned while in the course of his employment by the appellants. On the question of whether the occurrence arose out of the employment, had I been in the arbitrator's position, I think that on the facts held proved by him I should have drawn a different inference from that at which he has arrived. But the only question for us being Whether it could reasonably be held, as he has done, that the respondents had

proved that the death of the deceased Edward Lendrum was due to an accident arising out of his employment by the appellants? I am not prepared to say that such a conclusion, taking into consideration, as the arbiter says he does in the second last paragraph of the case, "the whole facts admitted and proved," could not be reasonably drawn. I emphasise this distinction because it seems to me that it has not always been maintained in the cases cited to us and which your Lordships have fully discussed. Thus Lord Justice Kennedy, in the case of *Burwash* v. *Leyland & Company*, July 18, 1912, 28 T.L.R. 546, 1 Gordon's W. Comp. Rep. 400, said in the passage quoted by Lord Dundas—"I feel myself obliged to say that the inference we are asked to draw here goes beyond anything justified by the circumstances which existed at the time." With great deference, it appears to me that we are not asked to draw any inference. What we are asked to do is to consider whether a certain inference could be reasonably drawn—whether we ourselves could or could not draw it. In this case I could not draw the arbiter's inference, but I think all the same it could be reasonably drawn. I do not decide that there was sufficient legal evidence to warrant the arbiter's decision, but only that there was such legal evidence as might reasonably warrant the inference.

Not only do the circumstances not suggest—they seem to me to negative—the idea either of violence or of suicide. The arbiter has found as a fact that the deceased did not commit suicide, and the averments of the appellants bearing on suicide have either been displaced altogether by the arbiter's report or so minimised as to lose all significance. An intention to enter the water for any ordinary legitimate purpose being equally out of the question, the respondents say that by a process of exclusion they have reduced the possible explanations of the deceased's death to accident. I think they are so far right. The difficulty remains that they must prove to the satisfaction of the arbiter that the accident arose out of the deceased's employment, and if the arbiter is in their favour they must prove to our satisfaction that the facts proved by them made it reasonable for the arbiter to decide for them.

If, as the arbiter thinks, it is sufficiently proved that the deceased met his death by overbalancing himself while vomiting over the ship's side, fell into the water and was drowned, I have no doubt that this occurrence would be an accident arising, not only in the course of, but out of, the employment. The death did not result from the sickness, but from the sickness occurring at a time when the circumstances connected with the employment introduced a special risk. The difficult question is whether there were grounds for the arbiter coming reasonably to the view he did. It is admitted that, whatever view be taken, there are circumstances in the case which are difficult to explain. If the result were that there was no more reason to infer accident arising out of the employment than accident arising outwith the employment—if there were no circumstances to suggest that the deceased was in the discharge of his duties when he fell overboard—then, as all the cases show, the respondents must fail, because the arbiter could not reasonably come to the conclusion at which he has arrived. In that case he would not be drawing a reasonable inference from facts, there being in the case I am assuming no facts from which an inference in the respondents' favour could be reasonably drawn. He would be proceeding merely on conjecture and surmise as to what was conceivable.

The arbiter, as I read the evidence, had it sufficiently proved that immediately before the accident the deceased received an order to prepare and serve a meal for the crew, that he understood the order and got up out of the bunk where he had been sleeping with the view of fulfilling the order, that when the accident must have happened he would naturally have been in the course of actively executing that order, and that the captain understood he was at the time of the accident so employed, and that the deck from which he must have gone overboard was a place where he might have occasion to be in the discharge of his duties. This being proved, it seems to me that very little more was required to lead reasonably to the inference at which the arbiter has arrived. The additional circumstances were found by the arbiter in the facts thus stated by him—"He was subject to attacks of nausea and sickness, and was seen on various previous occasions vomiting over the side of the ship"; and he adds—"His son Edward Lendrum, who frequently sailed with his father in said ship, and to whom his father's tendency to sickness was well known, immediately on hearing of his father's death expressed the opinion that he had fallen overboard while vomiting." Now if this statement by the arbiter only means that the deceased was unusually liable to sea-sickness, and does not imply a general proneness to nausea on land as well as at sea, and if the statement is consistent with the deceased's attacks having been long previous to the drowning, then I would agree with your Lordships that the facts thus held proved could not reasonably be held as sufficient, along with the circumstances above detailed, to warrant the inference which he has drawn. But I do not so read the arbiter's findings. Although they are lacking in important details which I think they might have contained, I read them as sufficient to lead to the reasonable inference that the deceased had gone from his cabin into the saloon to dress, that while dressing he was seized with an attack of nausea, and that, leaning too far over the bulwark while in the act of violent retching, he overbalanced himself and fell overboard. I do not say I should have thought these facts sufficient in view of no complaint of sickness having been made by the deceased or appearance of illness observed, and in

view of the height of the bulwark as compared with the deceased's height. But my difficulty arises, as I think, on a balancing of evidence. I am not prepared to hold that this is a case in which, as the Lord President put it in *Mackinnon's* case, the arbiter has "proceeded entirely contrary to evidence or upon no evidence at all." The facts in *Mackinnon's* case seem to me in essential features to have been very like those in the present case. No doubt the bulwark was only 20 inches, while in this case it was 41 inches, but I do not find any point made of the height of the bulwark in any of the learned Judges' opinions. Had the Court had occasion to review the arbiter's award instead of merely determining whether it involved a conclusion which could reasonably be arrived at, such an element would no doubt have been dealt with. In view of the functions which we are discharging, I do not think this difference between the two cases, the only one I can discover, is relevant.

I therefore think that on the facts admitted and proved the arbiter was justified in holding that the deceased Edward Lendrum met his death by accident arising out of and in the course of his employment by the appellants.

LORD JUSTICE-CLERK—Your Lordships have so fully dealt with the facts of this case and with various cases which were quoted in the debate that I feel it would be mere repetition if I were to attempt to go over the same ground again, agreeing as I do with the opinions of Lord Dundas and Lord Salvesen in every particular. In these cases in which a person in employment is found dead, there being no one present who can give any evidence as to how the death came about, difficult questions may arise as to whether the surrounding circumstances which are proved amount to evidence establishing that the death arose out of the employment, assuming that the primary condition is established that it occurred in the course of the employment. I say "proved," for without proof there can be no case on assumption. The numerous cases which were referred to give illustrations both of proof sufficient and proof that falls short of sufficiency. The applicant for an award under the Workmen's Compensation Act is in no different position from any other litigant who pursues an action. He must prove his case. He is not entitled to succeed on likelihood or deductions made from data insufficient to bring conviction to the mind. If the situation is obscure, then he cannot succeed. It has to be remembered that the employer who is sued under the Act is not in the position of an insurer. He has no bargain with his employee as an insurance company has with one insured. A person insuring his life stipulates that on his paying a premium out of his own funds the insurance company on his decease shall pay a certain sum to his executors. When the death occurs the right to the agreed-on sum emerges, and the burden of proof of exemption from liability rests on the insurers. If they set forth any defence such as suicide, the burden of proof is on them. But in the case of an employer, under the Act, he has received nothing from the person who is killed. He has undertaken no obligation. Any claim against him is a claim under the statute, by which he is ordained to pay compensation. He is in the position of being compelled by law to compensate his employee if these conditions are fulfilled—(1) that the workman has been injured or killed; (2) that the injury was caused by an accident; (3) that it occurred in the course of the employment; and (4) that it arose out of the employment. In this case it is the last question that is the important one—Did the deceased die from an accident arising out of his employment? I concur with your Lordships in thinking that this has not been proved so that the question can be answered in the affirmative. Lord Guthrie holds the arbiter could hold it proved (1) that the deceased was sick, (2) that he went and leaned over the rail, (3) that he over-balanced himself and fell into the water. I am unable to see how any one of these three things can be held to have been proved by any circumstantial evidence expressed in the finding of the arbiter, and unless they were all proved there could be no justification for deciding as the arbiter has done. It appears to me that, as was expressed by Lord Justice Fletcher Moulton (now Lord Moulton) in the case of *Marshall*, "the facts here amount to nothing more than the unexplained drowning of the seaman."

Lord Justice Farwell in the same case seems to me to put the matter most tersely and clearly, and I adopt his words when he says—"It is perfectly plain from the decisions of the House of Lords and of this Court that the *onus* is on the claimant to make out his case." The Act has thought fit to add to "the course of the employment" the words "arising out of the employment," showing that both these things are necessary. I cannot see myself how it is possible to infer from the mere fact that a man disappears in the course of his employment—that is, in the course of the voyage on his ship—here when the ship was in harbour—if he is employed as a seaman—without more, that he disappears in consequence of an accident arising out of his employment.

The Court answered the question of law in the negative.

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