Counsel for the Defenders and Reclaimers —Roberton Christie—Mackenzie Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Pursuers and Respondents —Lippe—J. G. Jameson. Agents—Boyd, Jameson, & Young, W.S.

Saturday, November 29.

FIRST DIVISION.

[Sheriff Court at Glasgow.

FRASER *v.* JOHN RIDDELL & COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising "out of" Employment—Fall from Footplate of Engine—Finding by Arbiter that Deceased was under the Influence of Drink and Unfit for Work at the Time of the Accident.*

An engine-driver while driving a traction engine fell off the footplate and was fatally injured. At the time of the accident he was under the influence of drink and unfit for his work. In an application for compensation at the instance of his widow the arbiter drew the inference that the fall was due to the deceased's intoxicated condition and refused compensation, holding that while the accident arose "in the course of," it did not arise "out of" the deceased's employment.

Held, on appeal, that the accident had arisen "out of" the deceased's employment, and that accordingly the claimant was entitled to compensation.

Mrs Agnes Turner or Fraser, widow, 80 South Portland Street, Glasgow, for her own interest and also as tutor for her pupil children, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VIII, cap. 58) from John Riddell & Company, contractors, Bishopbriggs, *respondents*, in respect of the death of her husband James Fraser, engine-driver there, who was fatally injured while in the service of the respondents. The Sheriff-Substitute (MACDONALD) refused compensation, and at the claimant's request stated a Case for appeal.

The *facts* were as follows—"1. On 26th March 1913 the deceased James Fraser was a traction engine-driver in the employment of the respondents John Riddell & Company. 2. About 11·30 p.m. on said date, while driving a traction engine belonging to the respondents in Bilsland Drive, Maryhill, Glasgow, he fell off the footplate on to the roadway. 3. One of the wheels of a waggon attached to the engine passed over him. 4. As the result of the injuries he received he died on the following day. 5. When he commenced his duties on the said date, and when he was last seen prior to the said accident by any person in authority over him in his employment, he was sober. 6. At the time of the said accident he was under the influence of drink and was unfit for his work. 7. The appellants were dependent upon him at the time of his death."

The Sheriff-Substitute further stated—"Apart from his intoxicated condition, there was nothing proved which would account for the deceased's fall off the engine, and I drew the inference that it was due to his intoxicated condition. I held that while the said accident arose in the course of, it did not arise out of the deceased's employment, and I found that the respondents were not liable to pay compensation to the appellants."

The *question of law* was—"Whether upon the evidence I could competently find that the said accident did not arise out of the employment of the deceased within the meaning of the Workmen's Compensation Act 1906?"

Argued for appellant—*Esto* that the deceased was drunk at the time of the accident, that was not enough to deprive the appellant of compensation. To exclude it the deceased must at the time have been doing something entirely without the ambit of his employment, and thereby exposing himself to an "added peril," *i.e.*, to a risk not involved in or incidental to his contract of service—*Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44; *Watkins* v. *Guest, Keen, & Nettlefolds*, (1912) 5 B.C.C 307; *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831. There was no exposure here on the part of the deceased to any risk not incidental to his employment, and unless that were so the defence of serious and wilful misconduct was irrelevant where, as here, death had resulted from the accident—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (*c*); *Mawdsley* v. *West Leigh Colliery Company, Limited*, (1911) 5 B.C.C. 80; *Harding* v. *The Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747; *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; *M'Lauchlan* v. *Anderson*, 1911 S.C. 529, 48 S.L.R. 349. The cause of death was the fall, which might have been due to a stumble. There was no finding that it was due to intoxication, though the arbiter had drawn the inference that it was so. *Esto* that the appellant must prove that the accident arose out of the employment—*O'Brien* v. *The Star Line, Limited*, 1908 S.C. 1258, 45 S.L.R. 935—she had done so here, for what the Court had to look to was the "proximate cause" of the death, viz., the fall from the footplate—*Wicks* v. *Dowell & Company, Limited*, [1905] 2 K.B. 225. The case of *Frith* v. *S.S.* "*Louisianian*," [1912] 2 K.B. 155, was distinguishable, for there the deceased was so drunk as to be totally incapable. He never got back to his employment at all.

Argued for respondents—The question whether an accident had arisen "out of" the employment was one of fact on which the arbiter was final, unless he had misdirected himself in law or drawn an unreasonable inference from the facts. There was here no evidence of the cause of death apart from intoxication, and that being so the arbiter was entitled to find as he did.

The finding that the deceased was unfit for his work was equivalent to a finding that he had exposed himself to an "added peril." He was therefore clearly outside the Act—*Barnes* (*cit.*). The arbiter was not entitled to assume that the accident had arisen out of the deceased's employment; it was for the appellant to prove that it had—*O'Brien* (*cit.*), *Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 718, *per* Collins, M.R., at p. 721; *Mackinnon* v. *Miller*, 1909 S.C. 373, *per* the Lord President at p. 379, 46 S.L.R. 299; *Barnabas* v. *Bersham Colliery Company*, 1910, 48 S.L.R. 727. The appellant had failed to discharge the *onus*, for the fall might have been due to skylarking, or to the wrongful act of a fellow-servant, and if that were so the respondents were not liable in compensation—*Armitage* v. *Lancashire and Yorkshire Railway*, [1902] 2 K.B. 178; *Fitzgerald* v. *Clarke & Son*, [1908] 2 K.B. 796; *Macintyre* v. *Rodger & Company*, December 1, 1903, 6 F. 176, *per* the Lord Justice-Clerk at p. 178, 41 S.L.R. 107; *Burley* v. *Baird & Company, Limited*, 1908 S.C. 545, 45 S.L.R. 416.

LORD PRESIDENT—I think the appellants here are entitled to have an award of compensation under the recent Act of Parliament. The rival views presented to us are these—Did the deceased suffer injury owing to an accident which occurred to him in the course and out of his employment, but which was brought about by his serious and wilful misconduct, namely, his intoxicated condition? or did the injury by accident arise whilst "in the course of" his employment but not "out of" his employment.

There is a material distinction between these two phrases. I think they have been quite correctly interpreted by Lord Justice Buckley in the case of *Fitzgerald* to which we were referred, where he says the words "out of" point to the origin or cause of the accident, whereas the words "in the course of" point to the time, place and circumstances under which the accident took place.

Now, having that distinction in view, let us see what it is that the arbitrator has here found. He finds, first, that the deceased was a traction engine-driver. He finds, second, that that traction engine-driver, while driving his traction engine, fell off the footplate on to the roadway—that is to say, that he was performing the duty which he was employed to perform, and in the course of performing that duty he fell off the footplate. Now I do not think it is pressing the arbitrator's finding too far to say that this clearly indicates that the evidence disclosed to the arbitrator that the deceased did not jump off and was not shoved off the footplate. He simply fell. If an engine-driver falls off the footplate while driving his engine, it appears to me that that is an accident which is incidental to the employment in which he is engaged. It is not what has been called in the cited cases "an added peril." It is just such an accident as might happen to him if he slipped his foot accidentally whilst perfectly sober and fit for his work. And accordingly the arbitrator finds that he was in the course of his employment at the time that the accident befell him.

But then he further finds that at the time of the accident he was under the influence of drink and unfit for his work. It was argued to us to-day by Mr Aitchison that the finding that he was unfit for his work comes into conflict with the finding that he was engaged in the performance of his duty of driving the engine at the time when the accident befell him. It appears to me that there is no necessary contradiction at all between these two findings. A man may be engaged in the performance of his work and an accident may occur incidental to his work, and therefore "out of" his employment, even although he is in a state of intoxication so great as to be, in the opinion of ordinary people, unfit for the performance of his work. If an accident befalls him under these conditions it appears to me that owing to his intoxicated condition it is rightly called an accident due to serious and wilful misconduct, but it is none the less an accident arising "out of" his employment, because it is incidental to it.

I think it unnecessary to review the authorities which have been so amply cited to us at the discussion to-day. I agree with the Master of the Rolls, in the case of *Watkins*, 5 B.C.C, 307, when he said that "it is not very easy to put cases on either side of the line," that is to say, whether the injury is accident arising "out of" the employment but brought about by serious and wilful misconduct, or whether it is more correctly denominated an injury which has not arisen "out of" the employment but is due to an "added peril." And I still more agree with what I observe Lord Justice Moulton says in the same case, where he points out that "Although serious and wilful misconduct does not prevent the workman recovering compensation in these cases, it does not make a thing within the Act that otherwise would not be; and so we have the difficulty of finding out a line between something that takes the accident entirely out of the employment and something which within the employment is a serious and wilful misconduct which leads to the accident. It is a difficulty which I do not think will ever be solved by phrases." I entirely agree with that opinion.

This case, it seems to me, it is not difficult to place on its proper side of the line. I think the facts found by the arbitrator lead necessarily and inevitably to the conclusion that the accident occurred not only while the man was "in the course of" his employment, but arose "out of" his employment. Accordingly I propose that we should answer the question put to us in the stated case in the negative.

LORD SKERRINGTON—I agree with your Lordship and have nothing to add.

LORD HUNTER—I also agree.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court answered the question of law

in the negative, recalled the determination of the Sheriff-Substitute as arbiter, and remitted to him to award compensation to the appellant.

Counsel for Appellant—A. M. Mackay. Agents—Hill-Murray & Brydon, S.S.C.

Counsel for Respondents—Horne, K.C.—Aitchison, Agents—Steedman & Richardson, S.S.C.

Wednesday, December 3.

SECOND DIVISION.

[Sheriff Court at Dumfries.

COSTIN *v.* HUME.

Process—Title to Sue—Charitable Fund—Title of Donee to Vindicate Right to Donation in Hands of Third Party.

Held that the donee out of a charitable fund had a title to sue a third party to whom the committee of the fund had sent money for payment to donee.

Mary Catherine Costin, residing at Buccleuch Street, Dumfries, *pursuer*, brought an action in the Sheriff Court, Dumfries, against Andrew Hume, music teacher, residing at George Street, Dumfries, *defender*, in which she sought to have it found and declared that the defender had no right of property, or other right, title, or interest, in a sum of £67, 2s. which was remitted to him on or about 2nd January 1913 out of the "Titanic" Relief Fund, by the committee in charge thereof, through Mr Percy F. Corkhill, the Town Hall, Liverpool; that the sum in question was remitted to the defender for the benefit of the pursuer and her pupil child, who was born on 18th October 1912, and to be paid over by him to the pursuer; and that the defender was bound to pay the sum in question with interest thereon to the pursuer; and for decree ordaining the defender to make payment of the sum in question with interest.

The pursuer averred, *inter alia*—"(Cond. 1) The late John Law Hume, who was one of the bandsmen on the White Star Liner 'Titanic,' was drowned in the wreck of that vessel in mid-Atlantic on or about 15th April 1912. He was a son of the defender and resided with him. (Cond. 2) At the date of the death of the said John Law Hume the pursuer was engaged to be married to him. (Cond. 3) Immediately after the wreck of the 'Titanic,' public subscriptions were opened for the benefit of the dependants of those who had perished in the disaster, including a fund known as the Mansion House Fund, which was administered by a committee under the Lord Mayor of London. As the pursuer was about to become the mother of a child, of which the said John Law Hume was the father, she, through her agent, Mr G. T. Hendrie, solicitor, Dumfries, lodged an application for a grant from the said fund on or about 28th June 1912. A reply was received from the *Daily Telegraph*, London, in these terms—'As this fund is working in co-operation with the Lord Mayor's Fund in the distribution of temporary relief, the letter addressed to the Mansion House has been forwarded to us. Will you please furnish information as per form enclosed.' The form was duly filled up and returned to the *Daily Telegraph*, and in reply they wrote to Mr Hendrie as follows:—'We are now in receipt of the form in favour of Miss Costin. We are quite willing to regard this claim sympathetically, but not at the cost of casting a slur upon the family of the deceased man Hume. The father writes to us contesting the claim which you are presenting, and alleges that he has most conclusive proof that his son was not responsible. . . . In these circumstances the *Daily Telegraph* must await further proof from you.' It was not possible for pursuer to take proceedings to establish the parentage of her child until it was born. (Cond. 4) By letter dated 8th October 1912 the *Daily Telegraph* wrote Mr Hendrie as follows:—'It rests with you to bring the claim of Miss Costin to the notice of the Mansion House Fund for permanent relief, and you should address yourself to the Public Trustee, 3/4 Clements Inn, Strand, W.C.' Accordingly on 9th October 1912 Mr Hendrie lodged particulars regarding pursuer's claim with the Public Trustee, who duly acknowledged the same. On 18th October 1912 the pursuer's child, a daughter, was born, and intimation was on same date sent to the Public Trustee. By letter dated 21st October 1912 the Public Trustee wrote to Mr Hendrie—'I have to acknowledge receipt of your letter of 18th inst. informing me that an infant child has now been born in the Costin case. This child has now been entered on the schedule of dependants, and her mother will receive consideration for relief in respect of herself and the child in due course.' (Cond. 5) By decree dated the 2nd and 3rd, both days of December 1912, in an action in the Sheriff Court at Dumfries at the instance of the pursuer against the defender and others as representatives of the said deceased John Law Hume, the Sheriff-Substitute found and declared (First) that the said John Law Hume was the father of the female child of which the pursuer was delivered on Friday 18th October 1912, and (Second) that the pursuer was entitled to recover out of any estate left by the said John Law Hume the sums after mentioned, namely—£2, 2s. for inlying charges, and £6, 10s. sterling per annum for ten years as aliment for said child, payable said aliment quarterly in advance, and beginning as from said date of birth, with interest thereon from the respective dates of payment and £13, 0s. 4d. of expenses. Said decree was pronounced after evidence led, and the child is still alive. (Cond. 6) On 11th December 1912 Mr Hendrie sent a copy of said decree to the Public Trustee, and in reply received a letter dated 16th December 1912 stating that he had forwarded the copy decree to Mr P. F. Corkhill, honorary secretary of the Liverpool Titanic Fund, whose com-