been his earning capacity—not what would have been his earning capacity in the particular employment in which he then was, but generally his earning capacity. That is the *prima facie* meaning of the words used, and they are not limited by any express provision that the standard is to be what he would have been earning in the employment of the same employer. That is enough, I think, to carry the case as the Court of Appeal have decided it; but even if the standard to be aimed at by the learned County Court Judge was a guess at what the workman would have been able to earn in the same employment, even supposing that was the condition, I am not at all sure that it has been violated in this case, because where there is an absence of evidence as to the actual earnings in exactly the same employment in the same district, the Act itself introduces the element of another workman other than the man himself, and what another workman is able to earn in employment which is not that of the same employer but an analogous employment in the same district. That has obviously introduced a standard which is not necessarily the standard of the employment of the same employer. Under those circumstances what has the learned County Court Judge to do in order to give himself a guide as to what this youth might probably have earned hereafter? Surely he is not bound to limit himself to speculations as to what he would have earned in the same employment under the same master. He must guide himself, in the first instance, as to the probabilities of the boy ever emerging from the condition of a mere labourer into that of a skilled artisan. In this case evidence is tendered and received that he was in fact able to overstep that barrier—that he had become in fact more than a mere labourer; he had become a skilled workman in another and, the County Court Judge might well consider, very analogous employment, employment in engineering works involving mechanical work of the same class, though probably not technically in every detail the same as that on which he was employed; but he had acquired the position of a skilled workman in mechanical occupation in the same district. He had been engaged in stove fitting, which was in the same class of occupation as that in which he had been employed at Vickers & Maxim's works. Therefore it seems to me that the learned County Court Judge might (and it was for him) perfectly well treat employment in which he had risen to the position of a skilled artisan as the same for practical purposes as testing his capacity to earn money in that sort of work. He might perfectly well treat that as a guiding fact in arriving at the decision as to whether this youth would have been able to earn the wages of a man and not those of a boy. But that is the head and front of the learned County Court Judge's offending in this matter. He has arrived at the conclusion that this boy should be looked upon as a person who, at the time at which he had to consider his capacity, had emerged from the position of a labourer into that of a skilled artisan, and was entitled therefore to have substituted the wages assessed by that standard. It seems to me, for these reasons, that the decision of the learned County Court Judge was perfectly right, and that the Court of Appeal was right in affirming it.

Appeal dismissed.

Counsel for Appellants—C. A. Russell, K.C. — H. T. Waddy. Agents — Telfer, Leviansky, & Company, Solicitors.

Counsel for Respondents—E. M. Pollock, K.C.—G. A. Scott. Agents—H. G. Campion & Company, Solicitors.

HOUSE OF LORDS.

Thursday, June 23, 1910.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, James of Hereford, and Dunedin.)

GALBRAITH *v.* GRIMSHAW.

(On Appeal from the Court of Appeal in England.)

Bankruptcy — Conflict of Law — Foreign Bankruptcy—Security Prior in Date.

A foreign bankruptcy is recognised only from its date, and does not cut down security rights obtained before that date, although they would be cut down by the law of the foreign bankruptcy.

Goetze v. *Aders* (1874, 12 S.L.R. 121, 2 R. 150) *approved.*

The appellant was a trustee in a Scottish sequestration. The respondents, who were judgment creditors of the bankrupt, had attached by a garnishee order an English debt due to the bankrupt. This security, being obtained less than sixty days before the date of the Scottish sequestration, would have been thereby cut down had it taken the form of letters of arrestment of a Scottish debt.

The Scottish trustee contested the effect of the garnishee order, and judgment against him was pronounced by the Court of Appeal (Farwell, Buckley, and Kennedy, L.JJ.).

The trustee appealed.

At the conclusion of the arguments their Lordships gave judgment as follows:—

Lord Chancellor (Loreburn)—In this case I think that the conclusion arrived at by the Court of Appeal ought to be supported. To my mind your Lordships would be wise to apply the rule explained by Lord President Inglis in the case of *Goetze* v. *Aders* (1874, 12 S.L.R. 121, 2 R. 150). I think that the rule is applicable in England also. An attachment in England will not prevail against a claim of a foreign trustee in a bankruptcy which is prior in date, provided that the effect of the bankruptcy is to vest in the trustee the assets in question. If the attachment is prior in date, then I do

not think that it will be affected by the title of the trustee in a foreign bankruptcy; and the reason is that a foreign law making the title of the trustee relate back to transactions which the debtor himself could not have disturbed has no operation in England, while the English law as to relation back applies only to cases of English bankruptcy, and therefore the trustee may find himself—as in this case—falling between two stools. I think in each case that the question will be whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt or assets in question situated in England. If any part of that which the bankrupt could have then assigned is situated in England, then the trustee may have it; but he cannot have it unless the bankrupt could himself have assigned it. It follows that the trustee cannot have this debt free from the garnishee order, because the bankrupt could only have assigned it on the 12th November subject to the garnishee order. With regard to section 117 of the Bankruptcy Act 1883, I think that it affects procedure and does not enlarge the rule to which I have referred, and I am not prepared to accept and act upon the case of *Solomons* v. *Ross*, which is scantily reported in 1 H. Bl. 131n., to which we have been referred. I am not prepared to accept that case as an authority against the rule which I have mentioned. I will not say that there may not be exceptions to that rule—as, for example, if the effect of the foreign bankruptcy were to transfer to the trustee only part of the assets of the bankrupt. Such points, to my mind, ought not to be settled or treated as settled except after consideration of the cases in which they actually arise. But I think it enough to say that in the present case I see nothing that should disturb the rule or the principle to which I have adverted.

LORD MACNAGHTEN — This is rather a singular case. If the bankruptcy had been an English bankruptcy, the attachment, being uncompleted, would not have prevailed against the claim of the judicial factor or the trustee in bankruptcy. If the attachment, or the process in Scotland that corresponds more or less with attachment, had been pending there, the claim of the judicial factor or the trustee in bankruptcy must have succeeded. But, as it is, a creditor of the bankrupt having duly obtained an attachment in England before the date of the sequestration cannot, I think, be deprived of the fruits of his diligence. It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the courts of the different parts of the United Kingdom shall severally act in aid of, and be auxiliary to, each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the absence of special enactment the Scottish Court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration. It must take the assets of the bankrupt such as they were at that date and with all the liabilities to which they were then subject. The debt attached by the order *nisi* was at the date of the sequestration earmarked for the purpose of answering a particular claim—a claim which in due course would have ripened into a right. With this inchoate right the Scottish Court had no power to interfere, nor has it even purported to do so. Therefore I think that the appeal fails.

LORD JAMES OF HEREFORD—I concur.

LORD DUNEDIN — I concur with the opinions which have been delivered. I think that the general principle which underlies every bankruptcy system is that after bankruptcy the bankrupt is no longer really the owner of his property, but holds it as trustee for the whole of his creditors for equal division. That carries with it necessarily the idea that some of his creditors may already have got security or may have taken part of the property in execution; and if the matter went no further than that, it is quite clear that both of those positions would be good as against the bankrupt himself, and consequently as against the rest of his creditors. It is a very natural development of that principle, in working out a bankruptcy system, that you should introduce a law of relation back, and that within a certain period, which will always be an arbitrary period determined by positive enactment, you should hold that the security given or the execution effected should have no effect, and that that property should be like the rest of the property of the bankrupt. Now, so far as the general principle is concerned, it is quite consistent with the comity of nations that it should be a rule of international law that if the Court finds that there is already pending a process of universal distribution of a bankrupt's effects it should not allow steps to be taken in its territory which would interfere with that process of universal distribution; and that I take to be the doctrine at the bottom of the cases of which *Goetze* v. *Adams* (*cit. sup.*) is only one example. But if you wish to extend that not only to the question of recognising a process of universal distribution, but also of introducing the law of relation back, then it seems to me that you get at once into rather great difficulties, because the question arises, According to which law will you apply the doctrine of relation back? If you take the law of the country of the bankruptcy, then the execution or security in question may be, and often is, of a kind which is quite foreign to the system of law which you are administering in the Bankruptcy Court.

If, on the other hand, you take the law of the country of the attachment, then you have to administer a law which is quite ignorant of the precise execution or security with which it has to deal. Accordingly, to say the least of it, there has been quoted to us no instance where as a question of international law a Court has applied the rule of relation back, and certainly there are dicta of Lord President Inglis which seem to point completely the other way. Of course that would not prevent the matter being dealt with in the United Kingdom by means of positive enactment. I need say no more as to that, because I entirely concur with what fell from the Lord Chancellor as to the true meaning of sections 117 and 118.

Appeal dismissed.

Counsel for Appellant—Radcliffe, K.C.—H. Dobb. Agents—Heath & Hamilton, Solicitors.

Counsel for Respondents — Rawlinson, K.C.—W. M. R. Pringle. Agent—Julius A. White, Solicitor.

HOUSE OF LORDS.

Monday, July 11, 1910.

(Before the Lord Chancellor (Loreburn), Lords James of Hereford, Atkinson, Shaw, and Mersey.)

MARSHALL *v.* OWNERS OF S.S. "WILD ROSE."

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1—"*Arising out of and in the Course of the Employment*"—*Seaman—Unexplained Drowning.*

While a ship was in harbour a seaman employed on board left his berth and went on deck during a hot night, saying that he was going up for fresh air. Next day his drowned body was found in the water just underneath a part of the ship's rail where the crew habitually sat. There was no further evidence to explain the drowning.

Held (*diss.* the Lord Chancellor and Lord James of Hereford) that, assuming the death had occurred by accident, there was not evidence to support the inference that the accident arose out of the employment.

A seaman was drowned under circumstances stated in their Lordships' judgments. His widow claimed compensation from his employers and was awarded £300 by the County Court Judge, who found upon the facts that the seaman had died from an accident "arising out of and in the course of his employment." This award was set aside by the Court of Appeal (COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.).

The widow appealed.

Their Lordships gave considered judgment as follows:—

LORD CHANCELLOR (LOREBURN)—This has been to me an anxious case, because of the view adopted by the Court of Appeal, from which I am always slow to differ, though I think that Fletcher Moulton, L.J., had some doubts. It involves two quite distinct questions. The first is, Does the evidence warrant the conclusion of fact reached by the County Court Judge—that this unfortunate man fell into the water by accident? The second is, whether, if that be so, the accident was one "arising out of the employment of the deceased." I wish to avoid confusion between those two separate points. In regard to the first of these questions, I observe that in none of the opinions delivered in the Court of Appeal is the conclusion of the learned County Court Judge controverted, though it was assailed in argument at the Bar of this House. We know, on the evidence, that on the evening of the 27th May the "Wild Rose" was in Aberdeen Harbour. At 10·10 p.m. Marshall came on board, went below, and took of all his clothes except his trousers, shirt, and socks. It was a very hot night. He subsequently came out of his berth, saying that he thought that he would go on deck for fresh air. The crew always sat on the starboard quarter against the fishboard. Marshall went on deck with his trousers, shirt, and socks on. At midnight he was not on deck. His body was searched for next morning and found just underneath where the crew usually sat. Beyond this we know nothing. Now in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that if there is no evidence in his favour upon which a reasonable man can act, he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved. I cannot possibly say that the County Court Judge was wrong, because I also conclude from the slight material before us that this man fell into the water by accident (suicide was not ever suggested) and so was drowned, and I do not believe that any jury would hesitate in saying so. Whether he was sitting on the rail or not I cannot conclude, and it is wholly immaterial. But that he fell off the ship by accident I do not really doubt. The second question is more difficult. Did this accident arise out of Marshall's employment? Let me see what his employment was. The respondents' case tells us that he was second engineer on the "Wild Rose," a steam trawler. In that capacity he had to serve continuously. Sometimes he would be actually minding