assent of the other party. I cannot believe that such an invasion of the law of contract was intended by the Workmen's Compensation Act 1906; and as to the other point I think it is quite clear that under the circumstances the benefit of maintenance did not constitute a purely unilateral advantage which it was competent to the seaman simply to waive. Under the contract as regulated by this statute the shipowner has an interest in his obligation to maintain the seaman—that is one way of putting it—or he has a right dependent upon the continuance of the period of maintenance which is of advantage to him, namely, to postpone in his favour the Workmen's Compensation Act period until the termination of the Merchant Shipping Act period. It follows, that to say that by deserting the workman got rid of any obligation as to his maintenance, for he discharged it, is to overlook the circumstances that the existence of that obligation was a thing beneficial to the shipowner, and being a thing which arose out of the contract could only be discharged either by mutual consent, which was not given, or by a repudiation of the obligations of the contract on the one hand, assented to, expressly or by implication, on the other. Neither of these things is found to have occurred. Surely it is not a fair statement of the argument for the appellant to say, as I think the learned judges below did say, that the shipowner claims the right to repatriate a seaman, or to declare that his return to Bombay is a condition-precedent to any obligation on their part under the Workmen's Compensation Act. The real point—at least I should have thought so—is that to permit a workman by refusing to proceed and be maintained on the voyage and to perform such services for his wages as he is fit to perform, and to receive his ultimate discharge in due statutory form when he is returned to Bombay—to say that he, being under these obligations, is entitled to declare by committing the crime of desertion that he will not perform them any longer, and thereupon entitle himself to bring into operation for his own advantage and for the disadvantage of the shipowner the Workmen's Compensation Act earlier than it would otherwise come into operation, is to deprive the shipowner of his rights under the contract, namely, to hold the man to his service, to require that being only partially incapacitated he shall render any services he can of a seamanlike character, and above all by maintaining in force the obligations of the service and of the Merchant Shipping Act to postpone the application of the Workmen's Compensation Act. It appears to me to be quite clear that even if you read the words "liable to defray" as meaning "liable under the particular circumstances to defray," or "*de facto* liable to defray," or "possessed of no defence that he could plead to an action for not defraying"—even if you read the words in that sense, you cannot do so without affirming that this contract has been made by this harmless-looking sub-section different from all other contracts, and is a contract which one party can break and thereupon dissolve to his own advantage without the consent of the other party. That, as I have already said, I do not think the statute provides. I therefore should have thought that the appeal should have been allowed.

Their Lordships ordered that the judgment of the Court below be affirmed and the appeal dismissed with costs.

Counsel for the Appellants—Moncrieff, K.C.—Bernard Sandeman (the latter of the English Bar). Agents — Macpherson & Mackay, W.S., Edinburgh—John Kennedy & Company, W.S., Westminster.

Counsel for Respondent—Mackay, K.C.—Aitchison—Gillies. Agents—W. G. Leechman & Company, Glasgow and Edinburgh—D. Graham Pole, S.S.C., London.

Monday, December 19.

(Before Viscount Haldane, Viscount Finlay, Lord Dunedin, Lord Shaw, and Lord Sumner.)

SCRIMGEOUR *v.* WILLIAM THOMSON & COMPANY.

(In the Court of Session, March 19, 1921, S.C. 588, 58 S.L.R. 398.)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Out of and in the Course of the Employment*"—*Seaman under the Influence of Drink Falling from Ladder whilst Going on Board Ship.*

A seaman who had been allowed ashore for his own purposes was returning to his ship by means of a ladder leading from the quay to the ship's bulwark, when owing to his dazed condition, due to the liquor he had consumed when on shore, he fell from the ladder and was drowned. *Held* (*diss.* Viscount Finlay, *rev.* judgment of the First Division) that the findings of the arbiter as to the cause of the accident amounted to an absolute finding that the sole cause of the accident was the drunken condition of the seaman; that that was a finding of fact which ought not to be disturbed; and that, accordingly, the accident did not arise out of the employment.

The case is reported *ante ut supra.*

William Thomson & Company appealed to the House of Lords.

At delivering judgment—

VISCOUNT HALDANE—If I were at liberty to speculate on the circumstances of this case, and if I had to act as arbitrator or as a judge of fact, I am not sure that I should not have come to the same conclusion as the First Division of the Court of Session. There is a great deal that is plausible in the view taken in the judgment of the learned Lord President, and a great deal that commends itself to my own sense of what the circumstances in this case really were. But I am not at liberty so to speculate. The statute under which we are proceeding is one which says that the question of fact

is a question for the arbitrator alone, and therefore the only question is, What has the arbitrator in this case found?

The arbitrator has made what may be called an award which consists of a conclusion prefaced by a statement of facts. The conclusion is that the accident to Scrimgeour did not arise out of his employment, and in the statement of facts the most important statement is—"That Scrimgeour caught hold of the sides of the ladder and went up without help, but in stepping from the ladder on to the rail of the bulwark, he, as the result of his dazed condition due to the liquor he had consumed, let go his grip of the ladder with both hands, lost his footing and fell back, struck the quay, and falling into the water was drowned." Then there is a note which he makes in pursuance of the Act of Sederunt for the purpose of bringing out any questions of law he has had before his mind in what he has done, and in that note he says of the accident that "it arose entirely out of the man's state of drunkenness." Now that as I read it is not a statement of law at all, but simply an explanation of the phrase he had used in his statement of facts, and it shows, what indeed the language of the statement of facts itself would show, that when he speaks of the accident as having been the result of the dazed condition of the man he means exclusively the result of that dazed condition.

As I have said, the arbitrator may have been right or he may have been wrong, but one thing is to me clear, that if we allow what is a pure issue of fact to be taken out of the hands of the arbitrator, then the very purpose for which this statute was passed is falsified and those concerned are plunged into a sea of litigation. I have come to the conclusion that there is a clear finding of fact in this case. Its substance is that the cause of the accident was exclusively the drunken condition of the workman, and I take that as meaning that in point of fact he was not doing anything arising out of his employment when in the drunken condition in which he was he tried to get on board his ship. That seems to me to be the finding of the arbitrator, and that being the finding of the arbitrator, and taking it as I do to be a finding purely of fact, I have come to the conclusion that the judgment of the Court of Session was wrong, and I move your Lordships that it be reversed.

VISCOUNT FINLAY—I regret that I take a different view of this case. It appears to me that the facts are found with perfect clearness; there is no dispute upon them at all; and the only question is what is the proper legal inference that arises from them.

Now as to the necessity of drawing a sharp distinction between fact and law, I should like to refer to what was said by Lord Atkinson in the case of *Herbert* v. *Samuel Fox & Co.* in 1916, 1 Appeal Cases at page 413. After referring generally to the question of findings of fact as distinguished from findings of law he says on that page—"It is wholly illegitimate in my view in cases such as the present, by finding in the words of the statute to endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact, that unassailability which properly belongs only to a finding on a question of pure fact." Lord Atkinson was there dealing with the danger which sometimes arises where the finding is put as he says in the very words of the statute. In the present case it appears to me that the note does not in any way deal with the discharge of the arbitrator's functions as a judge of fact; its function is not to add to the findings of fact but to state the view the arbitrator takes of their effect. To my mind the function of the note is explained by the Lord Justice-Clerk in the case of *Espie* v. *British Basket Company*. There is an Act of Sederunt relating to any note by the Sheriff after setting out the facts, stating the view that he adopts with regard to them, and what the Lord Justice-Clerk says is this, at page 657 of 1920 Court of Session Cases—"I presume that if the last clause of that finding had stated a pure question of fact it would be impossible for us to interfere with the result at which the arbitrator has arrived. But then under our Act of Sederunt the arbitrator has added a note explaining the grounds of his judgment. I do not think it is legitimate for us to use statements in the note for the purpose of supplementing the specific findings in fact which are contained in the Stated Case, but I think it is legitimate for us to use the note in order to discover the ratio in law of the arbitrator's judgment." I think that is incontestably true. In the present case, so far from the note in any way going to show that the finding was a finding of fact, to my mind it goes entirely the other way. The learned Sheriff-Substitute has found the facts with perfect plainness in findings 4, 5, 6, and 7 of the Case. He finds that the deceased had been ashore to make purchases; that he returned about eleven or twelve o'clock; that the only means of access from the ship to the quay and from the quay to the ship was an ordinary wooden ladder about forty feet long and about eighteen inches wide; that the ladder was properly secured at its upper end to the ship by ropes, and at the lower end it rested against a shed on the quay, and so on; that a watchman was employed by the ship to watch the shore-end of the ladder; that it was lit by two lamps, one on the top and the other at the bottom; that the top part of the ladder projected four or five feet above the bulwark; that there was a small ladder with three rungs inside the ship leading from the bulwark down to the deck, and men going on board stepped from the said long ladder on to or across the rail of the bulwark and so on to the small ladder, holding on to the former until they had a footing on the small ladder. Then he says that the ladder was used by other members of the crew coming on board; that the access to the ship was at the time of the accident to Scrimgeour

sufficient and quite secure; and then that he unfortunately had been to several public-houses where he was supplied with liquor, and that he was assisted by two of his fellow-sailors to reach the ladder, each taking an arm. Then No. 15 is the material finding on the critical point:—"That Scrimgeour caught hold of the sides of the ladder and went up without help, but in stepping from the ladder on to the rail of the bulwark, he, as the result of his dazed condition due to the liquor he had consumed, let go his grip of the ladder with both hands, lost his footing and fell back, struck the quay, and falling into the water was drowned." Then after the finding of facts under seventeen heads it goes on:—"From the foregoing facts I found that the said accident to Scrimgeour did not arise out of his said employment."

Well, so far as that statement of the facts goes, it appears to me to be quite clear that the facts are that the death of this man was due to his being in the dangerous position to which he had come as a sailor belonging to this ship for the purpose of rejoining it after being on shore, and then, being under the influence of liquor, after climbing up the ladder, losing his hold at the top where he had to step to the little ladder to take him down the other side of the bulwark on board the ship, so that he fell into the water and was drowned.

A great deal has been said about what the cause of the accident was. It is plain that the cause of the accident was the whole concatenation of circumstances. The two main circumstances were, first, that the sailor was drunk, and, secondly, that he was in a position where, unless he had his wits about him, he was in danger of falling at a spot from which if he fell he would probably be drowned. That is the inference, and the only inference anyone could draw from these facts. But then it is said that all that is varied by the note which the arbitrator has appended. The note is this—"This case appears to me to belong to the class of cases of which *Nash*, 1914, 3 K.B., page 978, is an example. The facts of the two cases bear a strong resemblance to one another. I think this accident had nothing to do with Scrimgeour's employment except that it occurred more or less in the place of his employment—that is, as he was going on board the ship. Though it may therefore be said to have occurred in the course of his employment, it did not arise out of it. It arose entirely out of the man's state of drunkenness—a dazed and semi-drunken state, which was sufficient to prevent him stepping on board with safety, a thing which other men in a more sober condition found no difficulty whatever in doing that night." Now the words "It arose entirely out of the man's state of drunkenness" are not a finding of fact at all; they occur in the course of the Sheriff's discussion of the effect of the facts which he had very carefully and in great detail stated before. When he begins by saying, "I think this accident had nothing to do with Scrimgeour's employment except that it occurred more or less in the place of his employment—that is, as he was going on board the ship"—that cannot mean that the fact that he was in a dangerous place like the top of the ladder leading to the ship had nothing to do with the melancholy result of the fall. It had everything to do with it, The man was there because as a sailor of that ship it was his duty to return to the ship. And there is a uniform series of authorities which would show that the man was there in the course of his employment returning to his ship.

The whole question here is as to the effect of the drunkenness. The finding that it did not arise out of the employment is not a finding of fact at all; it is perfectly impossible to say that the death of this man arose merely out of the drunkenness. It arose out of the fact that the drunkenness made the man lose his hold when he was at the top of the ladder, and the result of his losing the hold in that position was that he fell into the water. He was in that position in the course of his employment, as a uniform series of authorities to that effect shows. I really cannot read the words which follow—"It arose entirely out of the man's state of drunkenness—a dazed and semi-drunken state which was sufficient to prevent him stepping on board with safety, a thing which other men in a more sober condition found no difficulty whatever in doing that night"—as in any way adding to or varying the facts. It is merely arguing upon the facts which the Sheriff-Substitute has specifically found in the part of this document on the page preceding the note which I am now engaged in reading. And what strikes me upon it is this, that when he says that the accident arose entirely out of his drunkenness he is merely saying what any man would say in talking of such an accident. He was drunk, and drunk at a place where if he fell he would very likely be drowned; he fell owing to his drunkenness and he was drowned.

Under these circumstances it appears to me that the judgment of the Lord President takes absolutely the right view of this case, and in this judgment I may say that all the other Judges of the First Division concurred. At the top of page 15 the Lord President begins by saying that the workman met his death by a fall while getting over the ship's side by means of a ladder. He had to climb the ladder to a height of about 35 feet, and step from thence on to the ship's rail. He was in the act of stepping from the ladder on to the rail when he let go his grip of the ladder, lost his footing and fell. Then below—"The learned arbitrator finds that the letting go of the ladder, the slipping of the workman's foot, and his consequent fall were the result of his dazed condition due to the liquor he had consumed. From this finding he draws the conclusion that the accident did not arise out of the workman's employment." That takes the true view of what the Sheriff as arbitrator intended to find, and I am very glad to find that the Lord President so entirely concurs in the view which I take of the effect of what the arbitrator said. Then the Lord President goes on—"That the consumption

of the liquor by the workman was a circumstance conducive to the accident is clear. But the accident consisted in the fall from a high ladder, and falls from high ladders and the like were among the risks to which his employment peculiarly exposed him, drunk or sober. It is true that the risks arising out of any employment are enhanced by circumstances in the workman's condition which impair his control of his own movements, and a workman who comes to his work so much the worse of drink as to be unfit to perform it may properly be held guilty of serious and wilful misconduct if he suffers from an accident to which his unfitness has conduced. But this provides no reason for concluding that the accident does not arise out of the employment, and if (as happened here) the accident results in his death, his misconduct, even though serious and wilful, is of no account."

Then the Lord President refers to two of the authorities and goes on—"As was pointed out in the former of these cases, the fact that a workman's power of protecting himself against the risks to which his employment exposed him is impaired by indisposition or by excess does not constitute what is known as an 'added peril' of the employment. At the time the workman in the present case met his accident he was doing just what he was employed to do, and he was doing it by means of the proper appliances provided by his employers for the purpose and in the manner authorised by them. He did no more to add to the perils with which the use of these appliances in the authorised manner is attended than does any other workman who defaults in diligence for his own safety." It is just as if the man was guilty of gross negligence as he stepped from the long ladder by which he had come up on to this short ladder by which he was to descend to the deck of the ship. If he was careless at that point, if he stopped to shout to friends and did not attend to what he was doing and fell, it would be the result of negligence. Well, the negligence would not be the sole cause. No more was the drunkenness the sole cause, and I cannot think that it is taking a very favourable view of the arbitrator's conduct in this case to suppose that he meant in those words, by which he stated what I think he meant to be a conclusion in point of law, to find that the sole cause in point of fact was drunkenness. It is contrary to all the facts the arbitrator had just stated, which showed to demonstration that the true cause was the drunkenness combined with the fact that he was in a dangerous spot in the course of his employment.

LORD DUNEDIN—The learned Lord President specially says that he does not intend to prejudice a case where "the workman's state of intoxication is the sole cause of a misadventure which befalls him in the course of his employment," and in so doing he adopts a phrase that was used in the case of *Frith*, [1912] 2 K.B. 155. I agree with the Lord President. I have the misfortune to differ with him in the way in which I read the finding in this case. If I read the finding as anything less than a finding that as a matter of fact the whole cause was the workman's drunkenness I should come to the opposite conclusion.

The learned Viscount who has preceded me referred to the case of *Espie* and some words that the Lord Justice-Clerk used. What the learned Lord Justice-Clerk said is this—"I do not think it is legitimate for us to use statements in the note for the purpose of supplementing the specific findings in fact which are contained in the stated case; but I think it is legitimate for us to use the note in order to discover the ratio in law of the arbitrator's judgment." The reason he said that was this—The arbitrator in that case had found that the injury was sustained by accident out of and in the course of the employment. That is the sort of finding which, as Lord Atkinson said in *Herbert* v. *Fox*, cannot be protected by simply calling it a finding in fact, and in this case of *Espie* he had explained in a note that he had proceeded not entirely upon the findings of fact, but because he thought the state of facts brought the case in precise lines with a reported case called *M'Lauchlan* v. *Anderson*. The Lord Justice-Clerk used the note for saying—I now find what the real meaning is of his saying that the case arises out of the employment. He thinks it is governed by *M'Lauchlan* v. *Anderson*. Then when I look at *M'Lauchlan* v. *Anderson* I find it is no such thing, and therefore his finding will not stand; and in the result, instead of finding that the accident arose out of the employment, the Division found that it did not.

Now I quite agree with what the Lord Justice-Clerk says there, and if I thought that there was anything added in the note I do not think it would be legitimate; it would not be one of the findings in the case. If I thought that one's decision depended upon the first sentence, which says, "This case appears to me to belong to the class of cases of which *Nash* is an example," I should not take that as a fact, but when he goes on to say "It arose entirely out of the man's state of drunkenness," that does not seem to me to be adding an additional fact, but it is merely a reiteration of what he said in the findings before. Now those findings before I say I read not as the Lord President has done, but as an absolute finding that it arose from the man's drunkenness and nothing else, and the finding that it arose from the drunkenness and nothing else is, I think, a conclusion in fact which we ought not to touch.

LORD SHAW—I agree to the motion proposed from the Woolsack. One feels rather sorry to pass judgment in another of these cases, for the simple reason that one is adding to the labyrinth and mass of decided cases upon a simple clause of the statute. My view with regard to those numerous instances—in which the issue of liability is complicated by the fact of the workman's accident having occurred while he was in a more or less intoxicated condition—is at least this, that I should certainly affirm that the case of *Frith* was most properly

decided. But in the confusion and the refinement of distinction that exists among the cases I prefer to go back to the statute itself.

Now the statute itself does plainly imply that there is to be a causal relation between the employment and the accident—the accident is to arise out of the employment. It is no answer that it also says it is to arise in the course of the employment, which is the present case. The causal relation set up by the statute must exist between the accident and the employment itself. No one can doubt that that was the policy of the statute. This statute was enacted by Parliament for the purpose of putting on to employment a charge for compensation in respect of accidents which arose out of it; so far I have never heard it doubted that the policy of the statute was grounded upon that single fundamental fact.

I desire, in the first place, to disembarass the issue in this appeal from all reference to the case of *Espie*. I entirely agree with my noble and learned friend opposite who has just analysed it. The Act of Sederunt could not add in any respect to nor derogate from the Act of Parliament itself. The provisions of the Act of Sederunt were simply that when the Sheriff-Substitute had written a note it was to be appended to the case. But it is no function of the note to be anything else than expiscatory of what went before. If the note is expiscatory in this sense, that it shows that the findings in fact were in truth in the Sheriff-Substitute's mind really findings in law, then the Court looks at that note for the purpose, so to speak, of disentangling the facts found in the light of the explanation given. But in the present case the expiscatory note is to clear up any doubt or misapprehension as to what the Sheriff-Substitute meant as to the actual facts of this case.

I do not think the note was required. In my view the learned Sheriff-Substitute's findings, originally without the note, did mean two things. In the first place, that the place of this accident, and the furnishings and apparatus at that place, were suitable, were secure, and were safe. They meant, secondly, that this accident occurred not in consequence of anything in the place, or by reason of the man being compelled to use certain furnishings or works or ways, but solely and exclusively because he was not able to keep a grip upon the rail, and that arose, and solely arose, from his incapacity through drink. The cause of the mishap was not the employment, but was unhappily the man's intoxication. I must respectfully dissent from the view that if the workman be at his work and in his place and an accident takes place, then all the conditions of liability under the statute are satisfied, apart from the injury being self-inflicted or the accident self-caused. Secondly, I observe that in—as there nearly always is—a concurrence of causes for the production of one effect, the question, familiar and often debated, as to which, if any, is the true, the moving, the effective cause, is one of fact. And as bearing on the issue of drunkenness, the degree thereof as bringing it, or failing to bring it, up to the rank of a true, moving, and effective cause of an accident is also a question of fact. Surely it would be fair in all those cases to put the issue at least thus—Can it be said that the accident occurred to the workman exclusively by reason of his drunkenness? That I think is surely the furthest to which one could go in the interpretation of this statute. That issue being applied to the present case it is solved—solved not by reason of the note but by reason of the findings, in my judgment, because I hold it to be clear that the employment was not causally connected with the accident to this unfortunate man, but that the accident arose by his own self-indulgence, and I think it would be prostituting the Act for a purpose for which it was not intended to make the employment liable for such occurrences as in the present case.

In the course of the argument I put the illustration which I here repeat. Suppose a butler helps himself so freely to drink and becomes so intoxicated that in the course of his attendance at table he overbalances himself, falls on the floor, and is injured. Under the argument submitted the statute would make out of that a case of liability on the master for compensation. The argument has unsoundness on the face of it.

LORD SUMNER—I concur in the motion put from the Woolsack.

Their Lordships ordered that the interlocutor of the Court below be reversed; that in the interlocutor of 19th March 1921 the question of law be answered in the affirmative, and that it be remitted to the Sheriff-Substitute as arbiter to proceed with the cause; and that the respondent do pay to the appellants their costs in this House and in the Court of Session.

Counsel for Appellants—Neilson, K.C.—Dickson. Solicitors—Blackstock & Romanes, W.S., Leith—Botterell & Roche, London.

Counsel for Respondent—MacRobert, K.C.—Scott. Solicitors—Ross & Ross, S.S.C., Edinburgh — D. Graham Pole, S.S.C., London.

COURT OF SESSION.

Friday, November 4.

FIRST DIVISION.

BETT AND OTHERS (BETT'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Advances of Capital for Maintenance of Children—Right to Aliment Out of Parent's Estate.

A testator in his trust-disposition and settlement directed his trustees to pay to his wife in the event of her surviving him an annuity of £156, under burden of maintaining, educating, and clothing his children until they were of an age to provide for themselves. In the event of her marrying again the