are no relevant averments here to make out a case against the University Court on the special facts.

The only remaining averment which touches this matter is the statement that "the transaction was really"—*[quotes supra, Cond.* 11]. But that is really an averment, not that the University Court had a guilty knowledge, but that the matter was left in Mr Colquhoun's hands, and was carried through by him on behalf of both parties. And if this is not an averment of guilty knowledge, then in a case *de damno vitando*, as this is, the loss must lie where it falls. It certainly cannot be regarded as a relevant averment of facts and circumstances inferring knowledge on the part of these defenders, that they were participating in a fraud, or even that they were putting the trustees in a position to commit a breach of trust.

On these grounds I agree that the allowance of proof should be recalled.

LORD M'LAREN concurred:

The Court recalled the interlocutor of the Lord Ordinary, found that the pursuers' averments were not relevant to support the second conclusion of the action, therefore assoilzied the defenders the University Court, and remitted to the Lord Ordinary.

Counsel for Pursuers (Respondents) Morison, K.C.—Mair. Agent—James Ayton, S.S.C.

Counsel for Defenders (Reclaimers) — Dean of Faculty (Dickson, K.C.)—Macmillan. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 7.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

JACKSON *v.* GENERAL STEAM FISHING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1, *sub-sec.* (1)—"*Arising out of and in the Course of the Employment*"—*Question of Fact or of Law—Watchman Returning after Absence for Obtaining Refreshment.*

A workman was employed as a watchman to keep watch over certain vessels while in harbour, his period of duty lasting for twenty-five hours. While on duty it was necessary for him to be at times upon the quay. He had to provide his own food. While still on duty he left the vessels and went a short distance from the harbour to obtain refreshment. On returning he was drowned between the quay and the vessels. In a claim by his widow for compensation under the Workmen's Compensation Act 1906, the arbiter found in fact that the accident arose out of and in the course of the employment, and upon the ground that that was a question of fact and that there was no question of law between the parties, refused to state a case.

Held (1) that the arbiter should have stated a case, the finding being a finding in law, not in fact, which should have been so stated, and (2) taking the finding as a finding in law, that the arbiter had erred, the accident not having arisen "out of and in the course of" the employment. *Observed* by the Lord Justice-Clerk—"When the Sheriff finds certain facts proved, and then decides that these facts fall under the statute, a consideration of the law is necessarily involved."

Mrs Mary Ann Low or Jackson, in the Sheriff Court at Edinburgh, claimed from the General Steam Fishing Company, Limited, compensation under the Workmen's Compensation Act 1906 in respect of the death of her husband, the late Robert Slimon Jackson, watchman.

In the arbitration the Sheriff-Substitute (GUY), on July 8th 1908, found the defenders liable for £150 as compensation, and refused to state a case.

The defenders appealed to the Court of Session by note, stating that—"The facts admitted or proved are as follows:—(1) That the respondent is the widow of the late Robert Slimon Jackson; (2) that the appellants are a limited company carrying on business as trawlers at Granton; (3) that the said Robert Slimon Jackson was in the employment of the appellants, his employment being to watch the trawlers while they lay at Granton Harbour between their voyages; (4) that about 4 p.m. on Saturday, 22nd February 1908, he went on duty as watchman of four trawlers belonging to the appellants, moored to Granton quay, his duty in connection with these being expected to terminate about 5 p.m. on the following day; (5) that in connection with said duty it was necessary for him to be at times on the quay at Granton; (6) that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family; (7) that on the night of said Saturday, 22nd February, between nine and ten p.m., he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment; (8) that the refreshment partaken of by him at the hotel consisted of half a glass of whisky and a glass of beer; (9) that he was absent from the boats for a very short time, and on returning to the quay along with two friends he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned; (10) that said accident arose out of and in the course of his employment with the defenders; (11) that the average weekly earnings of the deceased were 6s.; (12) that the respondent was wholly dependent upon her said husband's earnings, and was the only person so dependent.

"The question of law proposed to be submitted for the opinion of the Court is whether the deceased was drowned through an accident arising out of or in the course of his employment.

"The appellants pray for an order on the respondent, the said Mrs Mary Ann Low or Jackson, to show cause why a case should not be stated by the Sheriff, for the following reasons:—(*First*) Because the deceased was a watchman who, on the above findings, left his employment to obtain whisky and beer, and was drowned while attempting to return to his duties as watchman, and the appellants accordingly maintain that no compensation is due. (*Second*) Because the question, whether the deceased was or was not killed through an accident arising out of or in the course of his employment under the conditions found proved as above, is a question of law and not of fact."

The Sheriff-Substitute issued the following certificate and note:—"The Sheriff-Substitute refuses to state a case for the opinion of the Court of Session, as in his view the question proposed is not a question of law but of fact, and that the arbitration disclosed no controversy between the parties except on questions of fact. *Note.*—I have revised the findings in fact to bring them into conformity with the proof in the proceedings."

Answers to the note were lodged by the pursuer, submitting that the proposed question was, in view of the findings in fact of the Sheriff-Substitute, not a question of law in terms of the Act but only a question of fact, that it had been decided as such by the Sheriff-Substitute as arbitrator, that he found that there was no controversy in law between the parties, and that it was incompetent in the circumstances for the Sheriff-Substitute to state a case.

The Court called on counsel for the respondent to argue whether the tenth finding as revised by the Sheriff-Substitute could be treated as a finding in fact.

Argued for the respondent—A finding by an arbiter under the statute that an accident arose out of and in the course of the employment was a finding in fact—*Henderson* v. *Glasgow Corporation*, July 5, 1900, 2 F. 1127, 37 S.L.R. 857; *Vaughan* v. *Nicoll*, February 6, 1906, 8 F. 464, 43 S.L.R. 351.

Lord Justice-Clerk—I am clearly of opinion that the Sheriff has erred here in refusing to state a case. We are told that some facts which are here stated are the facts upon which he gave his decision, and in these facts we are told—"(10) That said accident arose out of and in the course of his employment with the defenders."

Now I think that that might conceivably have been a question of fact, but in this case I doubt it very much myself. When the Sheriff finds certain facts proved, and then decides that these facts fall under the statute, a consideration of the law is necessarily involved. The respondents have referred us to two decisions of the other Division of the Court, and I do not desire to impugn these cases at all if they only go so far as to assert that the Court may hold that the Sheriff was right in deciding a particular question to be a question of fact. But I cannot assent to the proposition that the arbiter can exclude the jurisdiction of this Court simply by declaring that his decision consists entirely of findings in fact. Even if the facts are perfectly clear it makes no difference, for still it is a question of law that is decided on the facts. It seems to me that in every case that question must in its essence be a question of law.

Lord Low concurred.

Lord Ardwall—I am of the same opinion. I need only say that the question here is of a kind which this Court has had occasion to consider and decide again and again. What the Sheriff has stated as matter of fact in reality involves a question of law. We find an analogous case in the frequently recurring question as to whether a person is or is not a dependent of a workman whose death has been caused by an accident? In a certain sense that is a question of fact, but it is also, and in its essence, a question of interpretation of the statute; and has been treated as such in numerous reported decisions.

The parties thereupon agreed on a joint minute accepting the remaining findings in fact as the findings in fact of a case stated by the Sheriff-Substitute with finding (10) as the finding in law.

Argued for defenders and appellants—The accident had not arisen out of or in the course of the employment. The workman left his master's premises and that for an unnecessary purpose, and in these points the case was in contrast with *Keenan* v. *Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144. The workman had been outside his employment — *M'Allan* v. *Perthshire County Council*, May 12, 1906, 8 F. 783, 43 S.L.R. 592—and was also in breach of duty—*Martin* v. *Fullerton & Company*, June 30, 1908, 45 S.L.R. 812.

Argued for the respondent—Absence for the purpose of obtaining refreshment was reasonable and within the course of employment; the accident arose out of the employment—*Mullen* v. *D. Y. Stewart & Company, Limited*, June 17, 1908, 45 S.L.R. 729, *per* Lord Ardwall.

Lord Justice-Clerk—I have no doubt what our decision in this case ought to be. I take the case on the footing that all the findings except the tenth are findings in fact, and that the tenth finding is a finding in law. So taking it I have no hesitation in saying that the respondent here is not entitled to compensation for the death of her husband, because he was not killed by an accident arising out of and in the course of his employment. The workman here was put in charge of certain trawlers as a watchman. The essential part of his duty was to watch, and it was impossible that he could fulfil that duty by leaving his post

and going to a public-house. The moment he left the subject which he was to watch he was no longer in the course of his employment. This case is quite different from the case where a man is asked to do extra work and finds it necessary to leave his work to get some refreshment. Here the man knew that he was to be twenty-five hours on board the trawlers, and it was his duty to make his own arrangements for the supply of food and drink. There was nothing in the circumstances to justify him in leaving the subject he was put there to watch and going off to sit with friends in a liquor bar. The moment he left he ceased to be in the course of his employment. When he was coming back he was not in the course of his employment, because he had no right to be away. I think that in finding that the accident arose out of and in the course of his employment the Sheriff-Substitute erred in law, and that his judgment cannot stand.

LORD LOW and LORD ARDWALL concurred.

The following interlocutor was issued:—

"Find that the arbitrator was bound to have stated a case, and that finding 10 of his findings is a finding in law, not in fact, and should have been so stated: Further, having considered the joint minute and the note of appeal as amended as a stated case on appeal, find that the deceased Robert Slimon Jackson was not in the course of his employment when he met his death: Therefore remit to the arbitrator to recal his award and dismiss the claim, and decern," &c.

The Court decided the proposed question of law in the negative and assoilzied the defenders.

Counsel for Pursuer (Respondent) — Roberton Christie — Fenton. Agents — Mackie & Marshall, Solicitors.

Counsel for Defenders (Appellants) — Murray—Jameson. Agent—F. J. Martin, W.S.

Tuesday, November 3.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* AYR MAGISTRATES.

Burgh — Police — Road — Street — "Private Street"—"Part of any Railway"—Rails —Obstructions—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 4 (31) *—Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *secs.* 103 (6) *and* 104 (2) (*d*).

A railway company were proprietors of the *solum* of part of a road adjoining their line. The road, over which there was a public right-of-way for all purposes, lay within a burgh, and had been declared by a previous decision to be a "private street." The company thereafter constructed on the roadway a double line of railway in connection with their main line, the rails being laid above the level of the roadway. Subsequent to these rails being laid the Magistrates served the company with a notice of a resolution in terms of the Burgh Police (Scotland) Act 1903, sec. 104 (2) (*d*), which resolved that this road should be properly levelled and causewayed, and, *inter alia*, involved the removal of the rails from the roadway. *Held*, on appeal, sustaining the resolution of the Magistrates, that the laying of the rails on the roadway had not destroyed its legal character as a "private street," or made it "part of any railway" in the sense of the Burgh Police (Scotland) Act 1892, sec. 4 (31), and that the rails were an "obstruction" in the sense of the Burgh Police (Scotland) Act 1903, sec. 104 (2) (*d*).

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33) enacts—Sec. 104 (2) (*d*) —"For section 133 (of the Act of 1892) shall be substituted the following section —Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, causewayed or macadamised, and flagged and channelled in such a way and with such materials as to them shall seem most expedient, and completed with fences, posts, crossings, kerbstones, and gutters, and street gratings or gullies and drains for carrying off the surface water, and thereafter to be maintained, all to the satisfaction of the council." Section 103 (6)—"'Private street' shall in the principal Act [*i.e.*, of 1892] and in this Act mean any street other than a public street."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 4 (31), enacts —"'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, venel, thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing path or bank."

The Glasgow and South-Western Railway Company brought an appeal against a resolution of the Town Council of Ayr intimated by a notice served upon the appellants, dated 14th March 1908, which was in the following terms:—"Notice is hereby given that the Provost, Magistrates, and Councillors of the Burgh of Ayr (hereinafter called the Town Council) have resolved, in terms of the Burgh Police (Scotland) Acts 1892 to 1903, and in particular section 133 of the Burgh Police (Scot-