Argued for the appellant—(1) The appellant was in the employment of the respondents in the sense of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58)—*M'Cready* v. *Dunlop & Company*, June 16, 1900, 2 F. 1027, 37 S.L.R. 779. (2) Alternatively Williamson was a contractor, and the appellant being in his employment was entitled to compensation from the respondents under section 4 of the Act, provided the work on which he was engaged at the time of the accident was work undertaken by the respondents in the course of or for the purposes of their business. That condition was fulfilled. The work of scraping or cleaning the boilers of the ship was part of the ordinary routine work in the management of the ship, the business of the respondents. Without it they could not carry on their business, and it had to be performed in the course of their business. There was no question of repairs. The case therefore fell within section 4 of the Act—*Dittmar* v. *Owners of Ship*, V 593, [1909] 1 K.B. 389; *Burns* v. *North British Railway Company*, February 20, 1900, 2 F. 629, 37 S.L.R. 448; *Bee* v. *Ovens & Sons*, January 25, 1900, 2 F. 439, 37 S.L.R. 328; *M'Govern* v. *Cooper & Company*, November 30, 1901, 4 F. 249, 39 S.L.R. 102.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK — I can find no ground for differing from the decision of the Sheriff-Substitute in this case.

The respondents are shipowners, and it is of course their duty, as it is their interest, to see that their ships and their equipment, including the boilers, are in proper condition. We do not know the exact extent of the operations on the boilers in the present case, but they must at anyrate have been of considerable magnitude, and although the Sheriff-Substitute has found as a fact that the work of boiler-scaling is occasionally performed by shipowners themselves through their own employees without the intervention of a contractor, I cannot hold it to be one of the normal operations which form part of the ordinary business of a shipowner. Many shipowners have repairing staffs of their own and do extensive repairs by such a staff. But I think it is absurd to say that every operation which requires to be done on board a vessel, *e.g.*, the taking out of old boilers and the fitting of new ones or the repair of the old, is part of the trade or business of a shipowner as ordinarily understood. Such work is outside the ordinary business, although for reasons of their own some shipowners may do such work by persons employed by themselves. If that is so, what is the distinction in principle between these operations and the operation of boiler-scaling here in question? None that I can see. It was part of their business to have their boilers in good condition, but not to do the operations to put them into good condition. I accordingly think that on this branch of the case the Sheriff was right.

I think it is also abundantly clear that the injured workman was not in the employment of the shipowners. He was in the employment of Williamson and Williamson only, who had entered into a contract with the shipowners to perform the work. The only fact which might perhaps be suggested as pointing to his having been in the employment of the shipowners is the fact stated in finding 7 that a certain supervision over him and the other workmen was exercised by a foreman employed by the shipowners. But there is really nothing in this. Some supervision of some sort or other over the work which is going on is always exercised by anyone who contracts with a contractor for the carrying out of work, the object being to make certain that the work is carefully performed, and that no misconduct either in scamping work or in personal misbehaviour is committed, but this supervision does not affect the position of the workmen employed by the contractor or make them the employees of those who have made agreement with the contractor. I think, accordingly, that both questions in the case fall to be answered in the negative.

LORD LOW, LORD ARDWALL, and LORD DUNDAS concurred.

The Court answered both questions in the negative.

Counsel for the Appellant — Horne — J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondent—Stevenson. Agent—Campbell Faill, S.S.C.

Thursday, July 15.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LIMITED *v.* DUFF AND ANOTHER.

Cautioner — Insurance — Liberation — Guarantee of Calls Due by Member of Mutual Marine Insurance Association— Guarantee Required from Mortgagee of Ship Insured—Guarantee Granted "for Mortgagees" — Discharge of Guarantee through (1) *Discharge of Existing Mortgage*, (2) *Negligent Actings of Creditor.*

By the rules of a mutual marine insurance association it was provided that the insurance of any vessel which was mortgaged should not be valid unless the mortgagee or other approved person should have given a written guarantee of calls which might become due in respect of the insurance of such vessel. In March 1902 the C. Steamship Company became a member of the insurance association, and the "S." a steamship belonging to them was entered for insurance. At that date

there was a mortgage on the "S." in favour of a bank in security of an overdraft, for repayment of which D. and W. had granted a guarantee. In accordance with the rules of the association D. and W. therefore granted a letter in these terms—We, "for mortgagees of the steamship 'S.' entered by the C. steamship company for insurance in the above-named association, in order that the said insurance may remain in force notwithstanding such mortgage, do hereby undertake and agree to pay and discharge all sums of money which . . . may hereafter become due from the said" C. steamship company "in respect of such insurance." The mortgage was discharged in 1903, but at the same time a new mortgage was granted in favour of F. The insurance association were not informed of the discharge or of the new mortgage, which, however, were duly registered. In May, July, and September 1906 calls became due in respect of the "S." and were not paid by the C. steamship company, which went into liquidation in October 1906. No intimation of the failure to pay these calls was sent by the insurance association to D. and W., but in September 1906 they were asked to pay them. In May the "S" was at sea, but by September she was safely in port. In 1908 the insurance association raised action against D. and W. on their letter of guarantee for payment of the above calls.

Held (1) that the obligation of D. and W. under the letter of guarantee was not terminated by the discharge of the mortgage in 1903, but being granted "for mortgagees," who were not specified, remained in force so long as there was any mortgage over the "S.," and (2) that, inasmuch as the guarantee was as in any question with the pursuers a subsisting obligation, D. and W. were not liberated by the failure to notify them of the non-payment of the calls when due.

On 12th March 1908 the Britannia Steamship Insurance Association, Limited, a mutual marine insurance company carrying on business in London, raised an action against Thomas Lawrie Duff, shipowner, Glasgow, and John Eiston Wilson, writer there, to recover the sum of £88, 10s. with interest. That sum was the amount of three calls made by the pursuers, in May 1906 for £10, 16s. 6d., on 2nd July 1906 for £25, 1s. 6d., and on 1st September 1906 for £17, 14s., on the Cullum Steam Shipping Company, Limited, in respect of the insurance of the steamship "Samara," and of an additional call then due of £35, 8s., in respect of future calls. The first intimation of such calls received by the defenders was on 20th September 1906 when they were asked to pay. The claim against the defenders was made in virtue of a letter of guarantee granted by them upon 5th June 1902. At that date the defenders were virtually though not formally mortgagees of the "Samara," the mortgage being in the name of the Bank of Scotland, and the defenders being guarantors of the bank.

The letter of guarantee was in these terms—

"To the Britannia Steamship Insurance Association, Limited.

"*Class* 3.—*Ownership Risks—Protection and Indemnity.*

"We, Thomas Lawrie Duff and John Eiston Wilson of Glasgow, for mortgagees of the steamship "Samara" of , entered by the Cullum Steam Shipping Company, Limited, of London, for insurance in the above-named Association, in order that the said insurance and any further or other insurance of the said steamship in the name of the said Cullum Steam Shipping Company, Limited, in the said Association or in any class or classes thereof may remain in force, notwithstanding such mortgage, do hereby undertake and agree to pay and discharge all sums of money which now are or may hereafter become due from the said Cullum Steam Shipping Company, Limited, in respect of such insurance or insurances of the said steamship in the said Association or in any class or classes thereof."

The defenders pleaded, *inter alia*—"(3) The defenders' obligations under said letter of guarantee having come to an end when the mortgage in respect of which it was granted was discharged, they are entitled to be assoilzied from the conclusions of the summons. (4) *Separatim*—The defenders having by their actings, and in particular by their omission to give the defenders timeous intimation of the Cullum Steamship Company's failure to pay said respective calls of May and July 1906, prejudiced the defenders' position, are barred from making the present claim."

The *facts* are given in the two opinions (*infra*) of the Lord Ordinary (SALVESEN), who on 20th November 1908 allowed parties a proof.

Opinion.—"On 10th March 1902 the Cullum Steamship Company Limited became members of the pursuers' Association, which carries on business as a mutual marine insurance company in London; and their steamship, the 'Samara,' was entered for protection and indemnity at an insured value of £20,000. The risk was to commence on 22nd March 1902, and continue from year to year, unless notice to the contrary was given in writing.

"At the time of the insurance the pursuers were advised by the owners that there was a mortgage over the 'Samara.' Under rule 5 of the Association a vessel which is mortgaged is not held to be insured at all unless—prior to the happening of any loss which might give rise to a claim—the mortgagee shall have deposited with the managers a sum in cash to be agreed on between him and them, or shall have delivered an approved deed or undertaking 'whereby such mortgagee, assignee, or other approved person shall in due form covenant or undertake to pay and discharge all sums of money which may then be or thereafter become due from such member

in respect of said steamship.' In accordance with this rule the defenders, who were the mortgagees at the time, granted the obligation.

"The mortgage was paid off in the following year, 1903; but the pursuers aver that they were entirely ignorant of this, and that they continued the vessel in their Association in reliance, *inter alia*, on the defenders' obligation to pay calls. Such calls are, as is well known, equivalent to premiums payable to a proprietary insurance company, and are levied on the owners of the vessels insured in the Association in proportion to the insured values.

"The calls made from time to time were duly met until May 1906, when a call of £10, 19s. 6d. was made on the Cullum Steamship Company Limited. This call was due on the 4th of June, and was not met. Further calls were made on 2nd July and 1st September, which also remain unpaid. The Cullum Steam Shipping Company went into liquidation in the end of September 1906.

"The defenders maintained that, it being conceded that they had ceased to be mortgagees in 1903, the calls, of which payment is now sought, were in respect of liability arising subsequent to the date of discharge of their mortgage, and that they are entitled to be assoilzied. This contention has been given effect to in a similar case in the Sheriff Court of Lanarkshire; and I was referred to the opinion of Sheriff-Substitute Fyfe as embodying the view which they take. He says,—'Defenders never had any direct liability as members of the club. Their only liability was that of guarantors, and I think it is perfectly clear the guarantee was given only for the period during which the mortgage subsisted, and that it fell when the mortgage was discharged. The rules impose no conditions as to notice; and the laying on or discharge of a mortgage on a ship is a public fact which interested parties could ascertain from official registers.'

"I am unable to take that view in the present case. The object of rule 5, under which the letter of obligation was granted, is, I think, perfectly clear. The pursuers being a mutual marine insurance company, require to assess their members for losses which they from time to time incur; and they desire, as far as possible, to guard against the assessments which they make turning out bad debts. Where a ship is not mortgaged they assume that they will have no difficulty in recovering the assessments from the owners, but in the case of a vessel which is mortgaged, possibly to her full value, they decline to hold such a vessel insured unless they have some guarantee from the mortgagee that the calls will be paid. This was what the defenders provided in the letter already referred to. The cause of granting the letter, no doubt, was the fact that the defenders were then mortgagees; but it does not, in my opinion, follow that the obligation contained in it fell whenever they ceased to hold that character. That appears to me primarily to depend on a construction of the letter itself.

"The obligation is thus expressed:—'We do hereby undertake and agree to pay and discharge all sums of money which now are or may hereafter become due from the said Cullum Steam Shipping Company, Limited, in respect of such insurance or insurances of the said steamship in said Association.' That is a perfectly general obligation; and is not expressly limited to the period of the subsistence of the mortgage. The mortgagees are not even named; and although they are said to be the same persons as the guarantors, that could certainly not be gathered from the terms of the letter itself. I do not doubt, however, that the defenders could have put an end to the obligation as soon as they ceased to be mortgagees if the calls that had been made or were payable in respect of the period during which they had held the mortgage were duly met. In that case, however, the pursuers would, in accordance with rule No. 5 of their Association, have insisted that the new mortgagees should take their place (for it was admitted at the bar that a new mortgage was in fact granted), and give a similar obligation as a condition of their continuing the vessel in their Association. The Sheriff-Substitute seems to think that it is the duty of the insurance company to examine the register of each vessel which is insured with them,—I suppose from day to day, to ascertain if there is any change in the mortgages upon them. That might well be so if the letter of obligation had been expressed as binding only during the subsistence of the particular mortgage, in which case the more or less impracticable burden of making such investigation would have fallen upon the pursuers. It is, however, not so expressed; and in my opinion it was the duty of the defenders, when the mortgage was discharged, at once to intimate this fact to the pursuers, in which case they would have been relieved of further responsibility, and the vessel would either have remained uninsured, or a fresh obligation would have been procured. I am unable, therefore, at this stage to assoilzie the defenders on this ground.

"A serious question may arise as to whether the defenders can be made liable for any but the first call, as it would appear to be the duty of the pursuers to have intimated to them the failure of the Steam Shipping Company to pay it, and I doubt whether they can impose any other liability upon the defenders than would have been exigible from them if such intimation of non-payment had been duly made. In the meantime, however, I express no opinion on this, as there are certain facts which will require to be cleared up, either by a proof, or—what would seem to be more appropriate here—by a joint-minute of admissions, before I am able finally to dispose of the case. Meanwhile I shall allow parties a proof of their averments; and, as the case was sent to the Procedure Roll on the motion of the defenders, I shall find them liable in the expense of the Procedure Roll discussion."

And on 20th February, after a joint

minute had been lodged and a proof had been taken, the Lord Ordinary sustained the defenders' fourth plea-in-law and assoilzied them.

Opinion.—"I refer to the opinion which I delivered, after a hearing in the procedure roll, for a narrative of the facts out of which this action arises, and for my view as to the construction of the guarantee on which it is laid. The proof which has now been led discloses the following facts:—On 4th June 1906, when the first call (for which the defenders are sought to be made liable) was made, the steamship 'Samara' was trading in the East; and she continued to be subject to the ordinary marine risks until towards the end of September, when she arrived in port in this country, and when the shipping company, of which she formed the only asset, went into liquidation. It is admitted that, had the defenders received notice that they were being held liable for this call under their guarantee they would have been entitled at once to put an end to it, and under the rules of the pursuers' Association the vessel would thereafter have remained uninsured, for there was then an existing mortgage upon her for which the deposit or guarantee required by rule 5 had not been obtained. In these circumstances the defenders say that the owners of the new mortgage would have been compelled, in their own interests, to have procured a fresh guarantee which would effectually have relieved them of all liability for calls. I see no reason to doubt this; for while the owners of the vessel would have been uninsured, they would still have remained liable for the calls; and the mortgagee would almost certainly have preferred to undertake a cautionary liability for payment of the calls, rather than allow his interest in the steamer to be uninsured. By 20th September 1906, when application was made to the defenders for payment of the calls then due, the situation had entirely changed, for the shipping company had gone into liquidation, and the vessel having arrived in port was no longer subject to the ordinary marine risks. The mortgagee, therefore, had no interest to continue the insurance in force, more especially as it was then certain that he would have to sell the vessel under his mortgage. The defenders accordingly say that the failure of the pursuers to intimate to them that the call had not been met, and that they were being held liable under the guarantee, has seriously prejudiced their position, because it deprived them of the opportunity of getting some new obligant to take their place. I think they have proved this; and the only question which remains is, whether there was a duty on the pursuers to give such intimation—always keeping in view that they had no reason to suppose that the mortgage for which the defenders had originally become guarantors was no longer in existence—and were therefore, as I think, entitled to treat the defenders as still guarantors of the calls which from time to time became due.

"On the assumption just stated, I think it clear that the pursuers had a duty to intimate the non-payment of the calls to the mortgagee. Under rule 9 it is provided —'In the event of default being made by any member in the payment of the sum or sums for which he may be liable, as aforesaid, his respective steamship or steamships shall thenceforth cease to be protected or indemnified (as the case may be).' Accordingly, if the defenders had still been interested in the mortgage in respect of which they signed the guarantee, the pursuers knew that any loss thereafter occurring was one for which they would not be liable. In these circumstances I think it was their plain duty to the guarantors to intimate to them the default of the member, so that the insurance might be kept alive if the guarantors so desired. Evidence was given that in many cases the pursuers did not press the members for payment of calls when these were overdue. This was a course which, as in a question with the members, they were quite entitled to take, and which indeed it might be in their interest to take, for the member continued liable for payment of the calls, while the association was relieved of any obligation to pay for losses which the member's steamer might meanwhile sustain. In a question with the guarantors, who were either mortgagees themselves or signed the obligation on their behalf, the case seems to me to stand differently. The failure of the member to pay his call was not a thing which the pursuers had any reason to expect would be known to the mortgagee or his guarantors; and in all fairness the latter was surely entitled, if they were being held liable in the obligations of paying premiums, to have an opportunity of keeping the policy in force. As this opportunity was not given, I think the pursuers must be held to have released the guarantors from their liability for premiums, and on this ground I am of opinion that they fall to be assoilzied.

"The same result would no doubt also follow if I was wrong in the opinion I formerly gave—as to the guarantee falling with the mortgage in connection with which it was granted. A strong argument was submitted that there was no injustice to the pursuers in so holding, for the vessel would *quoad* them, have been uninsured from the date when the new mortgage was granted, and they would therefore be in the happy position of receiving premiums in respect of the 'Samara,' although they were under no obligation to meet any losses which might occur to her. The validity of this argument depends upon whether the existing guarantee might not be held to satisfy all the pursuers' requirements under their rules, and it seems that it was so treated throughout, for losses were settled in respect of the 'Samara' during the years following the discharge of the defenders' mortgage. No doubt this was done by the pursuers in ignorance that a new mortgage had been created; but there would certainly have been no equity which would have supported

the pursuers in refusing payment of a loss had they discovered the existence of the new mortgage at a time when all the calls had been paid by the owners and the pursuers were still in possession of the defenders' guarantee. The question thus raised is a difficult one, and I prefer to rest my judgment on the ground embodied in the defenders' fourth plea-in-law, as regards which I have already expressed my views."

The pursuers reclaimed, and argued—(1) The pursuers were under no obligation to give the defenders notice that the calls were not paid immediately they fell due. The obligation of the creditor to the cautioner in a case like the present, where the guarantee was for payment of sums of money, was altogether different from the obligation where the guarantee was one for the faithful discharge of the duties of an office—Bell's, Comm., 7th ed., i, pp. 378-380, and note 4 p. 379. In the present case the cautioner would not be liberated by the creditor's failure to tell him that the debtor had not discharged the obligation for which caution was granted—*M'Taggart and Others* v. *Watson*, 1835, 1 S. & M'L. 553; *Young* v. *Clydesdale Bank, Limited*, December 6, 1889, 17 R. 231, *per* Lord Adam at p. 240, 27 S.L.R. 135, p. 143; *Aitken & Company* v. *Pyper*, November 24, 1900, 38 S.L.R. 74; *Queen* v. *Fay*, 1878, L.R. (Ir.) 4 Q.B.D. 606. Nor were the defenders freed by the pursuers' failure to raise action against the debtors immediately the calls became due. Mere inactivity on the creditor's part was not enough to liberate the cautioner—Bell's Prin., 10th ed., section 262; *Black* v. *Ottoman Bank*, 1862, 15 Moore, P.C. 472, *per* Lord Kingsdown, at p. 483. Further, the cautioner was only liberated if the creditor's failure to do something deprived the cautioner of some opportunity of keeping himself safe—*Snaddon* v. *London, Edinburgh, and Glasgow Assurance Company, Limited*, December 3, 1902, 5 F. 182, 40 S.L.R. 164. The defenders here could instruct no prejudice. They could not have forced the new mortgagee to relieve them. He might have protected himself by calling up his mortgage or by insuring elsewhere. Besides, he ran no risk, for no default had been made under rule 9 by the mere non-payment by the debtor of calls recently due, especially where there was a cautioner. (2) The defenders' obligations were not terminated by the discharge of the first mortgage. The letter specified no particular mortgage, and was therefore binding so long as there was any mortgage on the ship. The pursuers never knew who were the mortgagees, and did not know of the change.

Argued for the defenders (respondents)—(1) The pursuers had discharged the defenders by their failure to notify them of the non-payment of the calls when they fell due. Under rule 9 the ship became uninsured on the default of the Cullum Company, and the pursuers were therefore demanding that the defenders should remain liable for calls after they themselves had ceased to be liable for losses. The defenders undoubtedly suffered prejudice by the failure of the pursuers to notify them of the default in June 1906. Had they then known of the default they could have forced the new mortgagee to take over their obligations in order to keep the vessel, which was then at sea, still insured. The Court would not inquire minutely how the cautioner might have protected himself had timeous notice been given—*Snaddon* v. *London, Edinburgh, and Glasgow Insurance Company, Limited, cit., per* Lord Justice-Clerk. The pursuers had also lost their recourse against the defenders by their failure to take steps to get payment from the debtors—*Philips* v. *Astling*, 1809, 2 Taunton 206, 11 R.R. 547. (2) In any event the defenders' obligation came to an end when the mortgage in favour of the Bank of Scotland, in respect of which it was granted, was discharged. The letter of guarantee must be read in the light of the surrounding circumstances—*per* Lord Justice-Clerk (Moncreiff) in *Caledonian Banking Company* v. *Kennedy's Trustees*, June 15, 1870, 8 Macph. 862, at p. 867, 7 S.L.R. 550; *per* Lord President Inglis in *Gray* v. *Gray's Trustees*, May 24, 1878, 5 R. 820, at p. 824, 15 S.L.R. 571, at p. 574. It was clear from the circumstances here that the guarantee was intended to subsist only so long as there was a mortgage in favour of the Bank of Scotland, and was not intended to create a personal obligation for calls which might become due when the mortgage no longer existed. It made no difference that after the mortgage in favour of the bank was discharged a new one was granted in favour of a party with whom the defenders had nothing to do. Counsel also referred to *Gaythorne* v. *Swinburne*, 1807, 14 Ves. 160, 9 R.R. 264.

At advising—

LORD LOW—The first question is whether the letter of guarantee granted by the defenders to the pursuers ceased to be operative when the mortgage of the s.s. "Samara," which when the letter was granted was held by the Bank of Scotland, was discharged.

The Lord Ordinary is of opinion that that question should be answered in the negative, and I agree with him.

It is clear that the defenders only intended to guarantee payment of calls by the Cullum Steam Shipping Company so long as the Bank of Scotland continued to be mortgagees of the ship, and it is equally clear that the pursuers could not have required them to give a guarantee which would remain in force after the Bank of Scotland ceased to be mortgagee. But the fact that the bank was the mortgagee was not disclosed to the pursuers, and they did not know that that was the case; and, as I shall presently show, the letter of guarantee in terms imposed liability upon the defenders so long as the ship was mortgaged to anyone. In my opinion the pursuers were under no obligation to inform themselves who was mortgagee at the time when the letter was granted, or to keep themselves informed in regard to the

transfer or discharge of mortgages, or the granting of new mortgages. When a mortgage of the ship was granted the insurance of the ship fell, unless in terms of No. 5 of the pursuers' rules the mortgagee either deposited a certain sum in cash or gave a written obligation or guarantee for payment of calls. It was therefore for the parties who were interested in having the ship insured to see that the guarantee necessary to keep the insurance in force was given, and I think that the pursuers were entitled to rely upon their doing so.

Now the obligation with which the letter of guarantee concludes is a general obligation to pay all sums due or to become due by the Cullum Company, but it was argued that the preceding clause, which states the cause of granting the letter, limits the general obligation to pay to the period during which the then existing mortgage (that, namely, in favour of the Bank of Scotland) should continue. When that mortgage was discharged it was contended that the letter itself showed that the guarantee came to an end.

I am unable to assent to that view. The letter is partly printed, and the printed form was evidently intended for the case (which is the usual one) of the mortgagee himself giving the guarantee. The printed form runs—"We . . . . being mortgagees of the steamship," and so on. In this case the Bank of Scotland and not the defenders were the mortgagees, but the defenders were the debtors to the bank for the advance in respect of which the mortgage was granted, and accordingly they, and not the bank, gave the guarantee to the pursuers. Accordingly, the word "being' in the printed form was deleted and the word "for" substituted. The letter as signed by the defenders therefore ran thus —"We, Thomas Lawrie Duff and John Eiston Wilson of Glasgow, for mortgagees of the steamship 'Samara,' entered by the Cullum Steam Shipping Company, Limited, of London for insurance in the above-named Association" (that is, the pursuers' Association) "in order that the said insurance . . . . may remain in force notwithstanding such mortgage"; and then there follows the unqualified obligation to pay any sums due or to become due by the Cullum Company in respect of the insurance of the said steamship.

Now if the defenders had themselves been the mortgagees, or if the guarantee had been given by the Bank of Scotland, and if they had been described (as in the printed form) as "being mortgagees' I think there would have been a great deal to be said for the view that the guarantee only covered the period during which the defenders or the bank continued to be mortgagees, because in that case I think that the natural meaning of the words "such mortgage" with which the clause narrating the cause of granting concludes, and upon which the defenders found, would have been the mortgage held by the defenders or the bank, as the case might be. But in the letter as altered the defenders were not described as "*being* mortgagees," but as obliging themselves "*for* mortgagees," without anything to indicate who the mortgagees were. That being so, the words "such mortgage" cannot be read as referring to any particular mortgage, but simply as meaning the mortgage held by the unnamed and undefined mortgagees previously mentioned. Therefore so long as the ship was in fact mortgaged, the letter was *ex facie* and in terms an obligation by the defenders to pay all calls due by the Cullum Company; and in my judgment the fact that the defenders only intended to guarantee payment so long as the bank was the mortgagee cannot be called in aid to modify the meaning and effect of the letter when read according to the natural and ordinary signification of the language used. I may say, however, that I think that the clause narrating the cause of granting had this effect, that if when the Cullum Company failed to pay the calls there had been no mortgages, the defenders would not have been liable. It is because the ship was mortgaged that the liability was, in my opinion, still in force.

Further, it was due to the defenders' own negligence that their obligation continued after the bank's mortgage was discharged. As I have already pointed out, the pursuers neither knew, nor were bound to know, anything about the mortgages of the ship. All that they knew, and all that it concerned them to know, was that they held the defenders' unqualified obligation to pay calls for "mortgagees." In these circumstances I think that the defenders must bear the consequences of their own negligence.

It was argued, however, in the second place, that the pursuers had released the defenders from their obligation by failing to intimate to them the failure of the Cullum Company to pay calls when due. The Lord Ordinary has given effect to that argument, but after the best consideration which I have been able to give to the matter I am unable to agree with him.

I take it to be settled that in an ordinary cautionary obligation for payment of money the creditor is not bound to give intimation to the cautioner that the principal debtor has failed to pay the sum when it fell due. That is a matter upon which the cautioner should inform himself. No doubt there may be exceptions to that general rule. For example, if during the currency of a continuing cautionary obligation circumstances came to the knowledge of the creditor which materially affected the risk which the cautioner had undertaken, and which, if they had existed when the obligation was undertaken would presumably have prevented the cautioner from entering into it, the creditor might very well be bound to communicate these circumstances to the cautioner. But I do not think that there were, to the knowledge of the pursuers, any such circumstances in this case.

The prejudice which the defenders say that they suffered by the pursuers' failure to intimate that the Cullum Company had

not paid calls when due arose in this way. Calls were made on the Cullum Company in May, July, and September 1906 which were not paid by that company, and the defenders were for the first time called upon to pay these calls as guarantors on 20th September 1906. When the first call fell due the "Samara" was at sea and subject to the ordinary marine risks, but by 20th September she had arrived in port in this country and was no longer subject to these risks. The defenders therefore say that if they had been informed on 4th June, when the call made in May became payable, that it had not been paid, they could have forced the then mortgagee to prevent the insurance of the ship from lapsing to take over their whole liability as guarantors, but on 20th September, when they became aware for the first time that the Cullum Company were in default of payment, the then mortgagee had no longer any interest to keep up the insurance of the ship.

Now in considering the effect to be given to that contention it seems to me to be of no consequence that the defenders believed that their guarantee had long before 1906 come to an end. If I am right in thinking that, in a question with the pursuers, the guarantee was still a subsisting and enforceable obligation, the question which I am now considering is exactly the same as it would have been if the defenders' guarantee had been expressly given for the existing mortgagee, or as if they had themselves been the mortgagees. In other words, the defenders must put their case so high as this, that in every case where the pursuers hold a guarantee by or for a mortgagee of a ship upon their books, they are bound, upon pain of losing their recourse against the guarantors, to give notice to the latter if the day upon which a call upon the shipowner becomes due passes without payment being made.

It seems to me that the answer to that view is that if the guarantee had been given by or for the existing mortgagee the circumstances upon which the defenders found as establishing that they were prejudiced by not receiving notice would not have existed. The defenders say that they were prejudiced because they lost the opportunity of putting the existing mortgagee in the dilemma of either having to pay the calls himself or to allow the insurance of the ship to lapse. If, however, the defenders had been the existing mortgagees, or had represented them, such a condition of matters could not have arisen, because there could have been no question of the insurance of the ship lapsing until they had an opportunity of paying the calls. The only prejudice which the defenders could have alleged in the case supposed would have been that by not getting immediate notice of the Cullum Company's failure to pay they lost any chance which there might have been of compelling that company to pay. The same thing, however, might be said of any cautioner for payment of money who has not received notice from the creditor that the principal debtor has not made payment on the due date; but, as I have said, it is settled that in the ordinary case the creditor is not bound to give such notice.

I may add that I do not see any reason arising out of the course of business of the pursuers' Association why mortgagees, or guarantors for mortgages, should not look after their own interests. Calls are made upon members of the Association approximately every two months, beginning with January in each year, and I do not think that it imposes any undue or unusual burden upon the guarantors to say that if they consider it to be essential for their safety to know whether or not the principal debtor pays his calls promptly when due they should make it their business to find out.

Accordingly I am of opinion that the defenders have no good defence to the pursuers' claim, and that the latter are entitled to decree.

There is one other point, however, which perhaps I should mention. I understand that the Cullum Company are in liquidation, and I suppose that the pursuers are creditors in respect of the unpaid calls. That being so, I imagine that the defenders are entitled to an assignation to the pursuers' claim.

LORD ARDWALL—I agree with the opinion which has just been delivered by my brother Lord Low. The first point is not without difficulty, but I think the effect of the alteration in the printed form of guarantee had the legal effect explained in the opinion just read. As to the second point, with regard to the pursuer's alleged failure to intimate to the defenders the non-payment of calls by the Cullum Steamship Company, I also agree. In ordinary cautionary obligations guaranteeing payment of sums of money it is settled that there is no obligation upon the creditor to certiorate the cautioner of failure on the part of the debtor to pay a debt or instalments of a debt for which the guarantee was given; but the circumstances may be such as to impose a duty upon the creditor to give a cautioner notice of circumstances coming to his knowledge which materially affect the risk undertaken by the cautioner. Such circumstances have occurred both in England and Scotland with regard to guarantees given to an employer for an official or servant. The case of *Snaddon* (5 F. 182) is a good example of this class of case. It is sufficient to say with regard to the present case that in my opinion there were no circumstances to take it out of the ordinary rule, and that there was consequently no obligation on the pursuers to give notice to the defenders of the Cullum Company's failure to pay the calls made on them by the pursuers.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the First Division.

The Court recalled the interlocutor of the Lord Ordinary and granted decree as craved.

Counsel for Pursuers (Reclaimers) — Morison, K.C. — Spens. Agents — Boyd, Jameson, & Young, W.S.

Counsel for Defenders (Respondents) — Horne—W. T. Watson. Agents—Whigham & MacLeod, S.S.C.

HOUSE OF LORDS.

Thursday, July 29.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Atkinson, Lord Gorell, and Lord Shaw of Dunfermline.)

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

(In the Court of Session, November 7, 1908, 46 S.L.R. 55, 1909 S.C. 63.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of and in the course of his Employment*"—*Sphere of Duty—Deviation—Watchman on Returning to Sphere after Obtaining Refreshment—Fact and Law.*

A watchman was employed to look after some trawlers while lying in a harbour, his duties extending from Saturday afternoon to Sunday afternoon, a period of 25 hours. He supplied his own food, which was sometimes brought him by members of his family. It was necessary for him at times to be on the quay. On Saturday night he went to an hotel a short distance from the quay, had half-a-glass of whisky and a glass of beer, and on returning to the quay proceeded to descend a fixed ladder to get on board one of the trawlers, when he slipped, fell into the water, and was drowned. He had only been absent at the hotel a short time.

Held (*rev.* judgment of the Second Division) that there was evidence to support a finding by an arbiter that the accident was one "arising out of and in the course of" the employment; *per* Lords Ashbourne, Atkinson, and Shaw, on the ground that the watchman had returned to, and was within, the sphere of his duty when the accident occurred; and *per* Lord James, on the ground that the obtaining of refreshment was necessary for the fulfilment of his duty—*dissenting* the Lord Chancellor, on the ground that though the watchman had arrived within the ambit of his duty, he was not on the ladder in the course of it, but in returning to it; and Lord Gorell, on the ground that the duty of watching prohibited the watchman's being away, and while he was entitled to be on the quay, there was no proof, the *onus* being on the claimant, that the watchman was there in connection with his duty. *Authorities reviewed.*

Observations, per Lord Shaw, *approving and applying Henderson* v. *Glasgow Corporation*, July 5, 1900, 2 F. 1127, 37 S.L.R. 857, to the effect that where an arbiter is of opinion that the question whether an accident is one arising out of and in the course of the employment is purely one of fact, he is entitled so to find and to refuse to state a case.

This case is reported *ante ut supra.*

The facts are given in the previous report and in the opinion *infra* of Lord Atkinson.

The claimant Mrs Low or Jackson appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The only question in this case is whether or not there was evidence upon which a reasonable man could find that the accident which caused the death of the deceased arose out of and in the course of his employment. If there was such evidence, this appeal must be allowed, for the Sheriff-Substitute answered the question in the affirmative. No doubt this is often a difficult point to determine, and it does not imply any reflection upon the judgment of a Court of First Instance that an Appellate Court, on a more mature examination, is unable to agree.

I assume as incontrovertible the findings in fact of the learned Sheriff-Substitute, but I cannot see that they contain anything which upon a fair construction warrants the conclusion at which he arrived. The place at which this accident occurred, namely, the fixed ladder which the deceased descended in order to get on board one of the trawlers, was within the ambit of his duty, in the sense that he had sometimes to be on the quay, and therefore might sometimes be obliged to use this ladder to get there from the trawler or thence to the trawler. This comes to no more than that he might be on the ladder in the course of his employment.

Still the question must be answered in this case, Was he on the ladder in the course of his employment, and did the accident arise out of that employment? It seems to me not to have been so. The only view I can take of the evidence is that this unfortunate man quitted his employment in order to go to the hotel and obtain refreshment, and that he was on the ladder on his return from that excursion. If he had remained at his duty he might imaginably have used the ladder to get on the quay and to return in the course of that duty. In fact, when he used it to return to the trawler he was not there in the course of duty, but in the course of returning to it.

I do not think the provisions of a remedial Act, such as this Act is, ought to be construed in any narrow spirit. When a man is employed, especially for so long a time, he is not usually expected to be at work unceasingly without either rest or pause. Everything, of course, must depend upon the nature of what he has to do, but allow-