was which in his view the workman should resort to. The workman, he told us, ought to present an application to the arbitrator to have recorded an alleged, or what I would prefer to call an imaginary agreement, said by the learned counsel to have been entered into between the workman and his employers. When that agreement had been recorded the next step was for the workman to charge his employers to pay under it. The employers would then suspend the charge, and would in their turn present an application to the arbitrator to review the compensation as fixed by the agreement.

If this procedure is really necessary the result is much to be deplored. For my part I should never sanction such procedure unless I was driven to it either by the express language of the Act of Parliament or by some express decision.

I am happy to say that in the present case there is no necessity for following that course. The workman has come into Court stating a plain case which requires arbitration, and he has not alleged any agreement whatsoever between him and his employers. I accordingly agree with your Lordship in the chair.

LORD CULLEN—I agree with your Lordships in thinking that the appellant's averments are not to be read as necessarily disclosing an agreement which can exclude this application, and I therefore concur in the answers which your Lordship proposes to give to the questions.

LORD JOHNSTON was absent.

LORD MACKENZIE was presiding at a sitting of the Railway and Canal Commission.

The Court answered the questions of law in the negative.

Counsel for Appellant — Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents — Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, June 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

M'KINNON *v.* J. & P. HUTCHISON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of the Employment*"—*Seaman Drinking Water Containing Solution of Caustic Soda.*

A seaman while on board ship at Spezzia was injured by drinking out of a can belonging to another seaman. The can contained a solution of caustic soda, and was found on a cool part of the deck. It was the custom for the crew to draw water from the pump and to set it in cans to cool in different places through the ship. This practice was sanctioned by the ship's officers. *Held* that there was evidence on which the arbitrator could competently find that the respondent met with an accident arising out of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought in the Sheriff Court at Glasgow, between Michael M'Kinnon, seaman, Glasgow, *respondent*, and J. & P. Hutchison, shipowners, Glasgow, *appellants*, the Sheriff - Substitute (A. S. D. THOMSON) found the respondent entitled to compensation, and stated a Case for appeal.

The Case stated—"The case was heard before me and proof led, when the following *facts* were established—1. That the respondent was a seaman on the s.s. "Fastnet," belonging to the appellants, on 16th August 1913. 2. That on said date, while the vessel was in the harbour of Spezzia, Italy, the respondent, who was a seaman on said vessel, in the employment of the appellants, by mistake drank from a tin, which he thought contained drinking water, a solution of caustic soda which the boatswain had put into the tin for the purpose of cleaning it. The tin was the property of the boatswain and the donkeyman, who messed together. They used it for brewing tea. 3. That as the result the respondent was badly burnt in the mouth and throat, and sustained severe and permanent injuries which completely incapacitate him for work. 4. That drinking water could at any time be obtained by the crew from the pump, which was situated amidships or somewhat abaft thereof; but as the water was warm to the taste, it was the practice of the crew to take it in tins or cans to a cool place, and leave it to cool, and partake of it as required. This practice was sanctioned by the officers, but it was never done by their orders. 5. That there was a good deal of give-and-take, so that it was quite common for one man to drink water which had been carried from the pump by some other man. 6. That the respondent found the tin referred to on the deck immediately below the forecastle head, where there was sometimes a draught of air through the hawse holes, and thinking it contained water which had been set there to cool, drank of it. 7. That the respondent's wages were £5, 10s. a-month, and his keep while on board, which may be estimated at 11s. 3d. a-week, his average weekly earnings having been in all £1, 16s. 3d. 8. That the respondent was discharged from the vessel on its return to Glasgow on 9th September 1913. 9. That the respondent caused a claim for compensation under the Act to be made to the appellants on 15th September 1913, but that he did not raise the present process under the Act until 4th September 1914. He explains the delay by the prolonged suffering and illness due to the accident. The appellants are now unable to trace many of the crew. The captain has died, and some evidence has probably been lost, which it might have been most desirable to have had.

"I *found* upon these facts that the accident arose out of and in the course of the respondent's employment with the appellants, and awarded compensation accord-

ingly at the rate of 18s. 1½d. per week from said 9th September 1913."

The *question of law* was—"Whether there was evidence upon which the arbitrator could competently find that the respondent met with an accident which arose out of and in the course of his employment with the appellants?"

Argued for the appellants—This was not an accident incidental to the employment of a sailor. It was an accident which might have occurred to anyone, and could not be said to arise out of his employment—*Rodger* v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413; *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381; *Macfarlane* v. *Shaw (Glasgow) Limited*, 1915 S.C. 273, *per* Lord Dundas at pp. 277, 279, 52 S.L.R. 236; *Craske* v. *Wigan*, [1909] 2 K.B. 635; *Plumb* v. *Cobden Flour Mills, Limited*, [1914] A.C. 62; *Keen* v. *St Clement's Press, Limited*, 1914, 7 B.W.C.C. 542. It was an added risk, or at least carelessness, which the employer was not bound to provide against—*Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804; *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831; *Thomson* v. *Flemington Coal Company, Limited*, 1911 S.C. 823, 48 S.L.R. 740; *Cook* v. *Manvers Main Collieries, Limited*, 1914 W.C. & Ins. Rep. 278.

Argued for the respondent—The accident arose in the course of the employment. The present case was analogous to those in which an accident had occurred during meals, and in which it had been held that the accident arose in the course of the employment—*Rowland* v. *Wright*, [1909] 1 K.B. 963; *Morris* v. *Mayor of Lambeth*, 1905, 22 T.L.R. 22. In the cases relied on for the appellants there was either secrecy or prohibition, and these elements did not exist here — *Heywood* v. *Broadstone Spinning Mill*, 1909, 128 L.T. 134. The present case was typically a case for the arbiter, who was judge of the facts — *Mackinnon* v. *Miller*, 1909 S.C. 373, *per* Lord President Dunedin at p. 377, 46 S.L.R. 299. The practice was sanctioned by the ship's officers. It was a fallacious test to say that the accident was not one which would be anticipated as incidental to the employment—*Trim District School Board of Management* v. *Kelly*, [1914] A.C. 667, *per* Earl Loreburn at p. 682, 52 S.L.R. 612; *Dotzauer* v. *Strand Palace Hotel, Limited*, 1910, 3 B.W.C.C. 387; *Kelly* v. *Auchentea Coal Company, Limited*, 1911 S.C. 864, 48 S.L.R. 768.

LORD GUTHRIE—The question put in this case is accurately stated, not as one has seen it in other cases, "Whether the arbitrator was right in holding" so-and-so, but "Whether there was evidence upon which the arbitrator could competently find that the respondent met with an accident which arose out of and in the course of his employment?"

There is no question but that what happened to the respondent on 16th August 1913 was an accident. Nor is there any question that the accident arose in the course of his employment. But the appellants say that what took place did not arise out of the employment.

The nature of the accident and the circumstances surrounding it are all of importance. It is not said that there was any blameworthy conduct on the part of the respondent. It is not said that in taking up a can containing, as he thought, cold water at the particular place where the can had been placed, he was doing anything that was not sanctioned by the officers of the ship. Statement 4 is all important, because that statement narrates that the appellants provided water for the crew. The crew got it by means of a pump, "but as the water was warm to the taste it was the practice of the crew to take it in cans to a cool place and leave it to cool, and partake of it as required. This practice was sanctioned by the officers, but it was never done by their orders." If one takes into view the situation at the time it seems to me that that statement comes to this, that in order to carry out the proper administration of the ship it was necessary that the water should be cooled after it had been taken out of the pump. The ship provided no means for cooling the water, but they sanctioned the practice of the crew to take it in tins or cans to a cool place; and, as I read the further averments, one at least of the cool places which the ship knew was so employed was the very place where this can with others had been placed. That being so, the respondent went to the usual place, and he found what appeared to be a can containing cold water. The can was one of the ordinary kind used for brewing tea, and it is not said that there was anything about the can to distinguish it from the ordinary can which in such circumstances would be expected to contain cold water.

These being the facts, apart from one question to which I shall refer immediately, namely, to whom the can belonged, the question comes to be whether in the sense of the statute as considered in numerous cases, many of them very difficult to reconcile, this was, as Lord Dunedin put it in the case of *Plumb*, [1914] A.C. 682, "a risk reasonably incidental to the employment." I am of opinion that the arbitrator was entitled on the facts stated so to find; and further, I am bound to say that I think he was right in so finding, although it is not necessary for one to go so far.

It is admitted that if the poisoned material had been contained in the pump which the ship supplied for the crew to use in getting water, and had been partaken of by the respondent with the consequences which actually happened in this case, the appellants would have been liable; or if there had been two pumps, one for drinking water and another for foul water for washing, and he had taken the wrong pump, the appellants would have been liable. But it is said that after the pump had delivered the water the appellants had no responsibility whatever for what subsequently happened. I cannot assent to that. It seems to me that facts found by the arbitrator involve that there was something further to be done, and that was to get the

water into such a state that it was fairly drinkable. I cannot otherwise read finding 4—that it was the practice of the crew to do this, and that it was sanctioned by the officers.

But then it is further admitted that if the ship had provided a shelf on which the tins were to be put, and if that shelf had happened to contain the very tin in question—a tin containing caustic soda—and if a sailor had taken the wrong tin, he having no reason to think it was the wrong tin, the ship would in that case also have been liable. Now I cannot distinguish the present case from the one I have just figured. It seems to me that what was done by the crew was just to provide what otherwise the ship would have had to provide, namely, a method of cooling the water. It was just a mere adjunct of the pump, and consequently the respondent cannot be said to have done anything which was either obviously dangerous or which was otherwise than in accordance with the ordinary practice of the ship, known to and recognised by the appellants.

This case seems to me in very sharp contrast with two cases that were quoted and relied on by Mr Jamieson in opening, and also referred to by Mr Horne in his speech, viz., *Keen*, 1914, 7 Butterworth, 542, and *Brice*, [1909] 2 K.B. 804. In both of these cases what was done was done without the employers' knowledge or permission. And the matter was very well put, by contrast with the present case, by Kennedy, L.J., in *Brice*, where he said, p. 810, in disallowing the workman's claim, that this was "a danger of his own choosing, and one altogether outside any reasonable exercise of his employment." By contrast with that case it seems to me that the present case is one where the workman did nothing which was inconsistent with the reasonable exercise of his employment, and that he did not incur any danger of his own choosing.

But then comes the difficulty, namely, that in taking up a can he took one which was not his own. It was the property of the boatswain and the donkeyman, who messed together. I read the case as meaning that he did not apply his mind as to whether it was his own can or not. He did not know that it belonged to anybody else. There was no case, therefore, of wrongously taking another man's property, or even of knowing it was not his own property, but what he did certainly requires explanation, and I find that explanation given in finding 5 by the arbitrator, namely—"That there was a good deal of give and take, so that it was quite common for one man to drink water which had been carried from the pump by some other man." The result, I think, is that a fact of that kind can have no bearing on the question whether the accident arose out of his employment. That was a matter for arrangement between the men, the cans, no doubt, being all identical or at least similar in appearance, and it mattering not the least to the men whether the can that a man at a particular time happened to take was his own or not, the understanding being that the man whose can he took would when it suited his convenience do the same with his can.

In the result, in supporting the arbitrator's judgment, we shall not be going against either the letter or the spirit of the enactment, nor shall we be in conflict with any of the decisions. Some of these decisions I think have gone a good deal further, whatever may be said about certain dicta in them, dicta, however, which must always be read in the light of the circumstances of the particular case.

LORD HUNTER—I think this is a narrow and difficult case. For the reasons stated by Lord Guthrie, however, I do not think that we should hold that there was no evidence upon which the arbitrator could competently reach the conclusion which he did. I therefore agree in the judgment proposed.

LORD JUSTICE-CLERK—In one thing at least I agree with your Lordships—that this is a narrow and difficult case. To my mind the difficulty is only created by the decisions which have been given in the past upon this Act of Parliament. Had this case been brought immediately after the Act was passed I would have had no hesitation whatever in holding that the claimant had not a right to obtain compensation from his master in the present circumstances. But the matter has been so extraordinarily extended by decisions that have been pronounced in the past—decisions which I feel bound to submit to—that I cannot see sufficient grounds for differing from the judgments which your Lordships have delivered.

LORD DUNDAS and LORD SALVESEN were absent.

The Court answered the questions of law in the affirmative.

Counsel for the Pursuer and Respondent—Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Defenders and Appellants—Horne, K.C.—Douglas Jameson. Agents—J. & J. Ross, W.S.

Tuesday, June 8.

FIRST DIVISION.

CARRON COMPANY *v.* FRANCIS AND OTHERS.

Landlord and Tenant—Local Government—County—Burgh—Small Dwelling-House—Occupier—House Letting and Rating (Scotland) Act 1911 (1 *and* 2 *Geo. V, cap.* 53), *secs.* 1, 7 (2), (6).

A firm of coalmasters were proprietors of a number of houses which they let out to their employees on lease. The leases were terminable by either employer or employee on a week's notice, and were also terminable by the employers at their option in certain contingencies, *inter alia*, on the employee leaving or being dismissed from their service. No employee was entitled or