Counsel for the Pursuer—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Solicitor of Inland Revenue (P. J. Hamilton-Grierson).

Counsel for the Defenders — Younger, K.C.—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, May 12.

SECOND DIVISION.

[Sheriff Court of Perthshire at Dunblane.

M'ALLAN *v.* PERTHSHIRE COUNTY COUNCIL, WESTERN DISTRICT, DUNBLANE.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident Arising Out of and in Course of Employment—Workman Doing Work outwith Scope and Time of his Ordinary Duties under Voluntary Arrangement with Fellow-Workman—Cases of Emergency.*

A county council were repairing a road by means of a steam roller, the hour for the daily commencement of operations being 7 a.m. The engineman, who otherwise would have had to come on duty before that hour, for his private convenience arranged with a surfaceman, one of his fellow-workmen, that the latter should do the work of breaking up the engine's fire and getting up steam. The work for which the surfaceman was employed by the county council, and which did not begin until 7 a.m., was to sweep and put "blinding" on the road while it was being rolled. He was accidentally injured while getting down from the engine before 7 a.m. *Held* that the accident did not arise out of and in the course of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897.

Lord M'Laren's statement, in *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, of the law applicable to the case where a workman is injured while doing something outwith the strict scope of his employment in a case of emergency, *approved*.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1 (1) enacts—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

In an arbitration upon a claim by John M'Allan (respondent) against The Perthshire County Council, Western District, Dunblane (appellants), under the Workmen's Compensation Act 1897, the Sheriff-Substitute at Perth (SYM) awarded compensation. At the request of the defenders he stated the following case:—"The appellants are the authority having control of the roads in the Western District of Perthshire, and the respondent, who is sixty-five years of age, was employed by them in road mending from 24th July till the beginning of September 1905, at a wage of 3s. 6d. per day. On 21st August 1905 the respondent when stepping down from a steam roller belonging to the appellants received an injury to his left leg below the knee, which ultimately resulted in periostitis of the leg. He thereafter presented an application for compensation under the Workmen's Compensation Act. At the date of and for some time prior to the accident the appellants' steam roller was being used in repairing the road between Kippen Station and Thornhill, which crosses the river Forth at the Bridge of Frew. The roller was under the charge of an engineman named M'Callum, assisted by a man named M'Arthur, who acted as fireman and flagman. It was exclusively the duty of M'Callum and M'Arthur to work, clean, oil, and fire the engine. The work of repairing the road was under the charge of M'Diarmid, a foreman surfaceman, who acted under the directions of the road surveyor, and the duty of the respondent was to sweep and to put 'blinding' on the part of the road on which the roller was working. The respondent was subject to the orders of M'Diarmid, but also occasionally required to take the directions of M'Callum, the engineman, as to the particular piece of road which was to be prepared for the roller. For the sole use of the engineman and fireman the appellants provided a moveable wooden hut, which at the date in question was stationed at the Bridge of Frew. Instead, however, of occupying the hut at night, the engineman and fireman, who were living in Doune, cycled backwards and forwards to their work, and allowed the respondent to sleep in the hut. The respondent, who had been lodging at Thornhill, was glad to get leave from the engineman to stay all night in the hut. The hour for commencing work was 7 a.m. It took a short time, however, to get up steam, and therefore the fire of the engine needed to be attended to before 7 a.m. In order to save him from returning before that hour in the morning, the engineman arranged with the respondent to break up the engine fire in the mornings before he arrived. The said arrangement was a mutual convenience to the engineman and the respondent. In accordance with this arrangement between him and the engineman the respondent, about 6·30 a.m. on the morning of the 21st August, went on to the engine which was drawn up near the side of the road for the purpose of attending to the fire. It was when he was stepping down from the engine a few minutes later, and before seven o'clock, that he sustained the injury to his leg. It was not part of the duty for which the respondent was employed or paid to attend to the engine or to work before 7 a.m. Having regard to the manner in which the

Supreme Court has interpreted the words 'arising out of and in the course of the employment,' I am of opinion that the accidental injury to the respondent's leg must be held to be within these words. . . . I have therefore found the respondent entitled to compensation, and awarded a certain compensation."

The following question of law was submitted for the opinion of the Court—"(1) Whether the respondent's accident arose out of and in the course of his employment by the appellants within the meaning of section 1 (1) of the Workmen's Compensation Act?"

Appellants argued—The accident did not arise "out of and in the course of" respondent's employment. "Out of and in the course of" involved two considerations—(1) the time of the accident; (2) the scope of the duties for which the workman was employed. As to "time," he was injured before the hour at which his employment began; as to "scope of duties," the work upon which he was engaged at time of accident was entirely beyond and outwith that for which he was employed. It was not a case of helping in an emergency or danger, or of doing something to further master's interest, but was a voluntary arrangement to do another's work. The following cases were in appellants' favour—*Callaghan* v. *Maxwell*, January 23, 1900, 2 F. 420, 37 S.L.R. 313; *Falconer* v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381; *Gibson* v. *Wilson*, March 12, 1901, 3 F. 661, 38 S.L.R. 450; *Benson* v. *Lancashire and Yorkshire Railway Company*, [1904] 1 K.B. 242. The case of *Sharp* v. *Johnson & Company, Limited*, [1905] 2 K.B. 139, was distinguishable.

Argued for the respondent—The accident arose "out of and in the course of the employment," because but for that employment it could not have occurred. "In the course of" referred, it was true, primarily to time, but the Courts had construed questions of time liberally and had not debarred a workman from compensation because the accident had happened a little before or after strict working hours—*Sharp* v. *Johnson & Company, Limited, cit. sup.* Similarly, too, the fact that he was not actually engaged upon the work for which he was hired was immaterial, if he was acting in a reasonable manner and in his master's interest, or that of a fellow-workman. *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526, was a favourable authority, and showed that this latitude was extended to cases other than those of danger and emergency.

LORD JUSTICE-CLERK — I confess I am somewhat surprised at the judgment of the Sheriff-Substitute, which in my opinion is clearly erroneous. The case is really a very clear one, and the facts very simple.

The engineman, who was in charge of the steam roller, required to be at his work some little time before the hour, viz., 7 a.m., at which the general work of road repairing began, in order that steam might be up and the engine ready to begin work at that hour. Accordingly he and his mate were provided with a moveable wooden hut in which they might sleep, and which accompanied the engine. The engineman and his mate, however, preferred to go home at night, and the former arranged with the respondent that he should see to the lighting of the fires in the morning and the getting up of steam. The respondent's ordinary duties were in no way connected with the engine or its working, he being one of the surfacemen who swept and put "blinding" on the part of the road on which the engine was working, and the arrangement under which he undertook the lighting of the engine's fires was a private one between him and the engineman, and entirely outwith the knowledge of their employers. The respondent was injured while stepping down from the engine, and claims compensation on the ground that he was injured in an accident "arising out of and in the course of" his employment by the appellants.

I am clearly of opinion that the accident did not arise out of or in the course of such employment. Admittedly the injured man's ordinary or normal duties were not connected with the working of the engine. It was not a case of emergency, or one in which the injured man was furthering the interests of his employers. The circumstances disclose simply an arrangement for helping the engineman, and enabling him to come on duty somewhat later in the morning. The case is entirely different from those in which a workman, acting in an emergency and with his master's interests in view, does something beyond the strict scope of his ordinary duties. In such cases he will probably be held entitled to compensation. The law is on this point well stated by Lord M'Laren in *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, who says at page 736—"Any accident occurring to a workman while engaged in promoting his master's interests is *prima facie* within the category of cases considered by the statute as constituting a claim. . . . We are familiar with the principle of common employment as used in the limitation of claims, and this principle may also be invoked to aid the interpretation of the statute, because impliedly each workman, besides having to perform the special work for which he is hired, owes something to the community of fellow-workers, and must be helpful according to his experience where necessity arises." That means where any emergency arises, and where it is the duty of all workmen where danger threatens to do their best to prevent an accident. An excellent illustration is the case of a runaway horse in a yard or a dock which is stopped by some workman who has nothing to do with its management, but who rushes forward and does his best to prevent an accident. The present case, however, presents no such features. There was no emergency; no necessity for the respondent's intervention; no interest of his employers to be served. I am accordingly

of opinion that the question must be answered in the negative.

LORD KYLLACHY—I am of the same opinion. The Sheriff-Substitute seems to have felt himself constrained by the decisions to hold that the accident in the present case was one arising out of and in the course of the respondent's employment. And it is certainly true that the tendency of recent decisions has been to give a very wide construction to that statutory expression, but it is necessary to draw the line somewhere; and it appears to me to be quite impossible to hold that an accident happening to a workman in such circumstances as occurred here was one which in any reasonable view arose out of and was in the course of this workman's employment.

LORD LOW concurred.

LORD STORMONTH DARLING was not present.

The Court answered the question in the negative.

Counsel for the Appellants—Hunter, K.C. —Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent—C. D. Murray. Agents—Wishart & Sanderson, W.S.

Wednesday, May 16.

FIRST DIVISION.

AYR COUNTY COUNCIL *v.* PATERSON AND OTHERS.

Local Government—County Council—Burgh Represented on County Council—Appointment of County Assessor—Right of Representatives of Burgh not Assessed for Payment of County Assessor's Salary to Vote in his Selection—"Matter Involving Expenditure"—Local Government (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 50), *sec.* 73 (8).

Held that the selection of a county assessor, whose salary had been already fixed, was not a matter involving expenditure in the literal sense of section 73, sub-section 8, of the Local Government (Scotland) Act 1889, and that therefore the representatives of a burgh which did not contribute to the assessment levied by the County Council to pay the salary of and outlays incurred by the assessor, were entitled to vote thereon.

The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 8, enacts—"Every burgh which contains a population of less than seven thousand shall, for the purposes hereinafter mentioned, and subject to the provisions of this Act, be represented on the county council of the county within which it is situated . . . in manner following, that is to say, (1) . . . (2) . . . (3) The provisions of this section shall apply to a royal burgh which contains a population of more than seven thousand, but does not return or contribute to return a member to Parliament, and to any burgh which contains a population of more than seven thousand but does not maintain a separate police force. (4). . . ."

Section 11 transfers to the County Council, *inter alia*, the whole powers and duties of the commissioners of supply save as in the Act after mentioned. These powers and duties include, under the Lands Valuation (Scotland) Act 1854 (17 and 18 Vict. cap. 91), the duty of having the valuation roll of the county made up (section 1), the power of appointing an assessor or assessors for this purpose (section 3), and power to levy an assessment to meet the expense thereof (section 18). The assessor has also the duty of preparing the register of parliamentary voters in terms of the County Voters Registration (Scotland) Act 1861 (24 and 25 Vict. cap. 83), the expense of which is authorised (section 41) to be defrayed by assessment on the lands within the county exclusive of the lands within a parliamentary burgh.

Section 73 (8) enacts—"The councillors or members of district committees appointed to represent a burgh or an electoral division consisting of a police burgh or part of a police burgh shall not act or vote in respect of any matters involving expenditure to which such burgh does not contribute or for which the lands and heritages in such burgh or police burgh are not assessed."

Section 83 (3) confers power on the county council to appoint from time to time, *inter alios*, assessors, and (6) provides that it "shall pay to the . . . assessors . . . such reasonable salaries, wages, or allowances" as it may think proper.

A special case was presented on behalf of (1) the County Council of the county of Ayr, of the first part; (2) Peter Paterson, solicitor, Maybole, a candidate for the office of assessor for the Carrick Division of the county of Ayr, of the second part; (3) Anthony C. White, solicitor, Ayr, also a candidate for the said office, of the third part; and (4) James Borland, Provost, and Ebenezer Bannatyne, Bailie, of the royal burgh of Irvine, the two representatives from the burgh of Irvine on the County Council of Ayr, and the Provost, Magistrates, and Councillors of the burgh of Irvine, as representing the burgh and community thereof, of the fourth part.

The case stated—"(5) Irvine is a parliamentary as well as a royal burgh within the county of Ayr. It returns two members to the County Council of the county of Ayr, in terms of the said eighth section of the Act of 1889. It has a population of more than 7000. It does not maintain a separate police force. (8) The assessors of the various divisions of the county of Ayr are paid by salaries fixed by the first party, and these are included in the estimates for each year. The salary at present payable to the assessor for the Carrick Division of the County Council is as follows, viz., (*a*) £85, 10s. per annum under the Lands Valuation Acts, including outlays, and (*b*) under the