the proportion of the expenditure which has gone to earn the price, £3135, for the feu-duties from that which belongs to the remaining rights which the respondents keep in their own hands. That is the problem to be solved, and I cannot see that any attempt has been made to solve it. It appears to me that the calculation of the profit upon this transaction is in reality a more complex operation than is assumed in the statement of account made by the Surveyor of Taxes. I think his method cannot be accepted, because he selects arbitrarily one item of the expenditure made by the company in acquiring this land and turning it into a rent-yielding subject, and sets that particular item in its entirety against a price obtained on the sale of a limited right in the property so acquired. I know no reason—and none has been stated—why the original price of the vacant ground should be supposed to be the exact measure of the expenditure necessary to earn the purchase price of the feu-duties any more than the expenditure laid out on building houses upon the land and so enabling it to produce that. I think the assessment must be rejected, because it proceeds upon no sound principle and because it is manifest upon the face of it that the sum set against the alleged profits as the expenditure necessary to earn the profit is altogether inadequate. If anything is on the face, it is that this sum of £3135 could never have been earned by spending merely something over £800 in buying land which produces no rental capable of producing feu-duties. I think, therefore, the decision of the Commissioners is perfectly right, and that the appeal ought to be dismissed.

LORD PEARSON—It is of course well settled that when once money has been received as profits it becomes taxable subject to certain deductions, and it is immaterial to what purposes the profits are thereafter applied. The question is whether the sum sought to be charged with tax is profit, or includes profit. Here £3135 was realised by selling feu-duties; and it is said that this sum includes the profit arising from the trade of buying land and creating and selling feu-duties, which is within the scope of the company's business. But the Crown authorities do not say that this is all profit. They admit, and they cannot but admit, that the original cost of the ground feued is a proper deduction for the purpose of income tax, and on this head they deduct £898. But if the cost of the land is a proper deduction, I am unable to find any reason why the cost of the houses built on it should not also be deductible in whole or in part. It is said that the two sets of transactions must be kept separate, and that the erecting and selling of houses is to run its own course as a profit-earning branch of the company's business; but that in the meantime the trade or adventure of buying land and creating and selling feu-duties has earned this profit, which is separately taxable. One can easily imagine a case in which that would be so; but in my opinion it is not so as regards this transaction. I think it is impossible to separate this land from the houses built on it in dealing with what is called the price of the feu-duties; for that price would never have been realised but for the houses. This being so, one of two things must follow. On the case as argued to us I should say either the whole question of profits earned must stand over until the complex transaction is worked out by the sale of the houses, which is the Commissioners' view, or, at the least, the cost to the company of the houses must be deducted in whole or in part from the price of the feu-duties, just as much as the cost of the ground. I do not express any opinion as to whether either of these would be a sound rule of charge, but in either view the assessment as made cannot be maintained.

LORD KINNEAR stated that LORD M'LAREN, who was absent, concurred in this judgment.

The LORD PRESIDENT was not present.

The Court dismissed the appeal, and affirmed the decision of the Commissioners.

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

Counsel for the Respondents—Scott Dickson, K.C.—J. A. T. Robertson. Agents—Laing & Motherwell, W.S.

Tuesday, November 13.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GOSLAN *v.* JAMES GILLIES & COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (1)—*Accident*—"*Arising out of and in the Course of the Employment*"—*Weighing Clerk and Bookkeeper Helping to Lift Machinery to be Weighed—Emergency,*

The duty of a workman employed as clerk and bookkeeper was to weigh articles which it was the duty of others to carry to the weighing-machine. *Held* that an accident which caused personal injury to him while engaged in helping to carry a heavy piece of metal work to the weighing-machine, was an accident "arising out of and in the course of the employment" in the sense of section 1 (1) of the Workmen's Compensation Act 1897.

Per Lord Kinnear—"I may add that I assent to the doctrine which we are told was laid down by the English Courts in the case of *Losh* v. *Evans & Company, Ltd.*, 1902, 19 T.L.R. 142, that where the master has divided the work into certain spheres, and one man steps out of his own class and undertakes to do work which he was not fit for and

which was not entrusted to him—as where an unskilled labourer undertakes to do the work of a skilled workman—he does not satisfy the conditions of the first section of the statute. But that is a totally different case from the one with which we are dealing."

Mrs Margaret Kean or Goslan, 636 Gallowgate, Glasgow, claimed from James Gillies & Company, brewers' engineers, 140 Glenpark Street, Glasgow, the sum of £234 under the Workmen's Compensation Act 1897 as compensation for the death of her husband. In an arbitration under the Act in the Sheriff Court at Glasgow, the Sheriff-Substitute (BOYD) granted absolvitor on September 14th 1906.

She took an appeal by stated case.

The facts as given in the case were—"(1) That the appellant is the widow of the late James Goslan, who was employed at the respondent's premises at 140 Glenpark Street, Glasgow, which are a factory within the meaning of the Workmen's Compensation Act 1897, and was wholly dependent upon the earnings of the said James Goslan, deceased, who is also survived by a son sixteen years of age, who earns 4s. a-week, and who was partly dependent on the earnings of the said deceased, his father. (2) That the deceased's earnings for the three years next preceding his death were at the rate of 30s. per week. (3) That the deceased was employed as clerk and bookkeeper, and as such it was his duty to weigh and record all articles sent out on order from the premises of the respondents; his duty in this respect was confined to weighing the articles which it was the duty of other employees to carry to the weighing-machine; that it was also his duty to count, weigh, and pack brass bushes for the bungholes of barrels, and this occupied him about three hours once a fortnight. He also kept under his care in a locked drawer in his employers' office the screws of the patterns of the moulding machine, and it was his duty to alter these when necessary three or four times in a month. (4) That on Thursday, 3rd May 1906, a brass frame weighing 3 cwts. 1 qr. 9 lbs. had to be weighed, and the deceased was helping to carry it from the engineering shop to the weighing-machine when he slipped and fell back and grazed the shin of his left leg against the edge of the frame; that he took no notice of the bruise until the Tuesday following, when a doctor was consulted, but by that time acute blood poisoning had set in, and he died on 15th May 1906."

The Sheriff-Substitute's finding was—"I found that his occupation at the time of the accident was gratuitous, and not in the course of his employment, and therefore I assoilzied the respondents and decerned, but in the circumstances found them liable in expenses in respect that I thought the respondents were greatly to blame in refusing the applicant access to their yard to make inquiries of the workmen as to the accident, and that free access would have resulted in a conviction on the part of the appellant that the deceased was not acting in the course of his employment at the time of the accident, and would therefore have rendered litigation unnecessary."

The questions of law for the opinion of the Court were—"(1) Whether the accident to the deceased James Goslan arose out of and in the course of his employment? (2) Whether the respondents are liable in the circumstances as found to pay compensation to the applicant in accordance with the provisions of the Workmen's Compensation Act 1897?"

Argued for the appellant—The Sheriff was in error in finding that the operation which caused the deceased's death was outwith the scope of his employment. If the operation which caused the injury was incidental to the workman's employment, or arose from emergency, then he was covered by the statute — *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, Lord President Kinross at p. 734, 37 S.L.R. 526; *Keenan* v. *Flemington Coal Company, Limited*, December 2, 1902, 5 F. 164, 40 S.L.R. 144; *Lynch* v. *Baird & Company, Limited*, January 16, 1904, 6 F. 271, 41 S.L.R. 214; *Rees* v. *Thomas* [1899], 1 Q.B. 1015; *Blovelt* v. *Sawyer*, [1904] 1 K.B. 271.

Argued for the respondents—This man was a clerk and book-keeper, and had nothing to do with the carrying of goods, so that the accident could not be said to "arise out of" his employment. He had clearly travelled outwith the scope of his employment—*Losh* v. *Richard Evans & Company, Limited*, [1902] 19 T.L.R. 142. Further, it was no case of emergency. The emergency necessitating interference must be proved, and that had not been done here. There was really no element of emergency to entitle him to go outside his own sphere — *Lowe* v. *Pearson*, [1899] 1 Q.B. 261, A. L. Smith (L.J.) at 263. The case of *Menzies* v. *M'Quibban*, *cit. sup.*, was distinguished by the finding there that the foreman could have ordered the workman to do what he was doing when the accident causing the injury occurred. The statute therefore did not apply, and the questions should be answered in the negative and the appeal dismissed.

LORD M'LAREN—This case raises a point with which we are not unfamiliar. The question is whether the pursuer, who is the widow of a clerk and book-keeper, is entitled to recover compensation for the death of her husband on the ground that he met with an accident while acting within the scope of his employment. The material facts are just two, and they are very distinctly stated in the case. The first is "that the deceased was employed as a a clerk and book-keeper, and as such it was his duty to weigh and record all articles sent out on order from the premises of the respondents; his duty in this respect was confined to weighing the articles which it was the duty of other employees to carry to the weighing machine." I do not read further on this point. The other material statement relates to what actually occurred and gave rise to the accident. It is "that on 3rd May 1906, a brass frame weighing 3 cwts. 1 qr. 9 lbs. had to be weighed, and

the deceased was helping to carry it from the engineering shop to the weighing machine when he slipped and fell back and grazed the skin of his left leg against the edge of the frame." That does not look like an accident in itself serious, but unfortunately blood-poisoning set in and the man died.

Now, on the first of the findings which I have read, it would seem that it was no part of the duty for which Goslan was engaged, to assist in carrying heavy articles to the weighing machine. On the other hand, I think we may take it as a matter of common knowledge that when heavy articles are to be carried from place to place in a manufacturing establishment, it may be necessary that the men who take them off the machines should have some extra assistance to lift the load from one apartment or place to another, and in such cases, as you do not have a reserve of idle men kept on the premises, some one whose duties lie nearest to those of the men who are bound to do the work, would naturally be called in to help them. I assume, in the absence of any statement to the contrary, that additional assistance, at least to the extent of one person, was needed for carrying this brass frame to the weighing machine, and that being so, it seems to me that the man who had charge of the weighing-machine, and to whom the frame was to be carried to perform the next operation upon it, was the most likely person and the most suitable person to apply to in order to give assistance. Now, I cannot see that in giving the assistance which Goslan did he was in any way travelling beyond the scope of his employment, or that he can be represented in any reasonable sense as going outside the scope of his employment. I think, on the contrary, he was in the course of his employment, because he was assisting his neighbours to do something that was necessary to enable him to weigh the frame.

It has often been said in this class of cases that it is a material consideration whether the man whose action is in question had intervened for the purpose of promoting his employer's interests or merely to relieve a fellow workman. In one of the cases quoted to us (*Menzies* v. *M'Quibban*, 1900, 2 F. 732) I see I am reported to have said—"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 the necessity arises." It was a need of intervention in that case, which was the case of a person assisting an engineman to put a belt on a pulley. Now, whether you describe the occurrence as a case of necessity as I have done in this passage—perhaps necessity is not the most appropriate word—or whether you call it an emergency or a proper occasion, is not of much consequence except for accuracy of definition, because in each case we have to consider, apart from definition, whether the thing done was a reasonable extension of the man's ordinary duties, and such as a master or his overseer might reasonably have required the man in question to perform. I think if this weighing clerk had refused to give a hand in lifting articles which were to be weighed, he would not only have been doing a disobliging act, but if this came to the knowledge of his immediate superior he might perhaps have been classed amongst people who were troublesome, and would have to be got rid of at the first opportunity. But it is not necessary to go so far as that, because I am content to support the claim of compensation on the ground that what was done, although beyond what the deceased was specially hired to perform, was still within the scope of his employment, and was a reasonable act done in the furtherance of the employers' interests. I therefore suggest to your Lordships that we should remit this case to the Sheriff to assess the compensation.

LORD KINNEAR — I am of the same opinion. I see no reason for holding that the deceased man had gone outside the course of his employment, and in so doing had exposed himself to the risk of accident, which he would have avoided by doing his duty. Where two or more workmen are employed in the conduct of one operation, although they have different parts to perform, it cannot be said that one of them goes outside his employment merely because he lends a hand to the others who are doing what is necessary for the work. It seems impossible to infer from what appears in the case that the deceased did anything that a reasonably helpful man would not have done in the circumstances in furthering his master's business in the operation in which he was engaged.

The ground for rejecting this claim comes to a very narrow point. If I understand counsel for the employers aright, his position was that if an emergency had arisen which called for the intervention of the workman, the accident would have been within the scope of the Act, but that the principle which in that case would have entitled him to compensation is inapplicable if he intervenes on a reasonable occasion for giving his assistance. I cannot say that I see any sufficient ground for that distinction. It seems a narrow understanding of the contract of employment to say that he went beyond his duty in giving a helping hand to the others.

I may add that I assent to the doctrine which we are told was laid down by the English Courts in the case of *Losh* v. *Evans & Company, Limited*, 1902, 19 T.L.R. 142, that where the master has divided the work into certain spheres, and one man steps out of his own class and undertakes to do work which he was not fit for and which was not entrusted to him—as where an unskilled labourer undertakes to do the work of a skilled workman—he does not satisfy the conditions of the first section of

the statute. But that is a totally different case from the one with which we are dealing.

LORD PEARSON—I am of the same opinion. The employers are not liable unless the accident arose out of and in the course of the employment. A workman may take himself out of the scope of these words if (for example) he acts contrary to an express order, or if being an unskilled workman he takes upon himself to do work requiring skill. In the present case I do not think there is enough to take the workman outside his employment. He was clearly within the first part of the description, because there is no doubt that the accident arose out of the employment. As to the second point, whether it happened in the course of the employment, he was not only doing his employer's work, but in my opinion he might have been asked to lend a hand in the way he did. But whether that be so or not, it is fairly clear that he interposed in the furtherance of his employer's business in what may quite properly be described as an emergency. I think we ought to answer the question in the affirmative.

The Court answered both questions in the affirmative, and remitted to the Sheriff to determine and award compensation.

Counsel for the Claimant and Appellant —Morison, K.C. — Jameson. Agent — J. Gordon Mason, S.S.C.

Counsel for the Respondents — Spens. Agents—Macpherson & Mackay, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 19.

(Before the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Low.)

M'MURDO *v.* M'CRACKEN.

Justiciary Cases — Summary Complaint — Procedure — Instance — Complaint Brought by Appointee of School Board—Delegation of Authority to Prosecute—Conviction in Absence of Appointed Prosecutor—"Private Prosecutor or Complainer"—Education (Scotland) Act 1872 (35 *and* 36 *Vict. c.* 62), *sec.* 70—*Summary Jurisdiction (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 33), *sec.* 9 (1).

A summary prosecution was instituted in the Sheriff Court under the Education (Scotland) Acts at the instance of A, the person appointed by a School Board to prosecute in terms of the Education (Scotland) Act 1872, sec. 70. At the trial A did not appear, but was represented by B, a qualified law-agent, whom A had instructed to appear in his place. The Sheriff-Substitute held that the instance was bad and dismissed the complaint. *Held*, on a bill of advocation, (1) that the person appointed by a school board to prosecute in terms of the Education (Scotland) Act 1870, sec. 70, is not a "private prosecutor or complainer" in the sense of the Summary Jurisdiction (Scotland) Act 1881, sec. 9 (1), and consequently is not entitled to the privilege therein conferred of being represented by a duly qualified law-agent; and (2) that the appointment by A of B to appear in his stead was not good, and that the Sheriff-Substitute had rightly dismissed the complaint.

Thomson v. *Scott*, June 11, 1901, 3 A. 410, 3 F. (J.) 79, 38 S.L.R. 814, *followed.*

The Education (Scotland) Act 1872 (35 and 36 Vict. cap. 62), sec. 70, which makes provision for a school board being kept informed of any parents failing to supply their children with elementary education, and for the school board summoning before it such parent, enacts that if the parent "shall fail either to appear or on his appearance to satisfy the school board that he has not failed in such duty without reasonable excuse for such failure, and shall not undertake to the satisfaction of the school board to perform such duty by forthwith providing such elementary education as aforesaid for his children, it shall be lawful to and shall be the duty of the School Board to certify in writing that he has been and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county or district of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the Sheriff of the county for such failure of duty as is in the certificate specified. . . ."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. cap. 33), sec. 9 (1), enacts —"Every complaint at the instance of a private prosecutor or complainer under the Summary Jurisdiction Acts may be signed either by such private prosecutor or complainer, or by a duly qualified law-agent on his behalf, and such law-agent may, in the absence of the private prosecutor or complainer, appear in Court and conduct the prosecution on his behalf."

On the 26th May 1906 John Johnstone M'Murdo, writer, Airdrie, instituted in the Sheriff Court at Airdrie, in the interest of the School Board of Old Monkland, a complaint under the Education (Scotland) Acts against Leslie M'Cracken, coalmaster, Greengairs, New Monkland. The Sheriff-Substitute (GLEGG) on 15th June 1906, after evidence led, dismissed the complaint.

M'Murdo brought a bill of advocation.

The circumstances of the case as set forth by the complainer were as follows:—The complainer was a solicitor carrying on business in Airdrie and holding other public appointments in that burgh. He was, *inter alia*, the person appointed by the School Board of the parish of Old Monkland to prosecute in terms of the Education (Scotland) Acts 1872 to 1901. In that capacity he was directed to proceed against