of the action referred to in the petition —for citing him, a necessary witness on his own behalf whose evidence, owing to his being about to leave the country, is in danger of being lost, and grant commission to the said Mr R. A. Lee to take the oath and the examination of the petitioner, and to receive any exhibits and productions made by him in regard to the matter at issue between the parties to the said action, at such time and place as the said commissioner may appoint, due notice thereof being given to the defender or her known agent; dispense with the adjustment of interrogatories, and appoint the deposition of the witness and productions, if any, made by him, to be sealed up by the commissioner and immediately thereafter transmitted to the clerk of the process, there to lie *in retentis* subject to the future orders of the Court."

Counsel for Petitioner — Macgregor. Agent—James G. Bryson, Solicitor.

Saturday, June 17.

FIRST DIVISION.

[Sheriff Court at Paisley.

REVIE *v.* CUMMING.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of*" *Employment.*

A carter, employed as a brakesman, had as his duty to walk continuously at the rear of a lorry, ready to apply the brakes when directed to do so by the driver. He got upon the lorry, which he was expressly forbidden to do, and took a seat in front by the driver, with whom he began to talk on matters which had nothing to do with the work on hand. While he was in that position the driver called upon him to put on the brakes. In jumping off the lorry, with the intention of obeying the order, he fell and was injured.

Held that the facts justified a finding that the accident did not arise out of his employment in the sense of the Workmen's Compensation Act 1906.

John Revie, carter, 15 Storie Street, Paisley, *appellant* claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from William Cumming, contractor, Paisley, *respondent*, in respect of injuries sustained by him while at work in the respondent's employment. The Sheriff-Substitute (LYELL) having refused compensation, a case for appeal was stated.

The *facts* were as follows—"(1) The appellant is a carter, and on 31st October 1910 was in the employment of the respondent, who is a contractor in Paisley. (2) On the morning of the said 31st October 1910 the appellant was one of a squad of four men in charge of a lorry belonging to the respondent, to which were harnessed five horses, three abreast as wheelers, and two abreast as leaders. (3) The said lorry weighed about three tons, and on the morning in question was laden with a casting some ten or eleven tons in weight, which was being conveyed from the engineering works of Messrs A. F. Craig & Co., Paisley, along the road leading from Paisley to Glasgow. (4) Of the four carters accompanying the lorry and its load, one was seated on the front of the lorry and driving the wheelers, two were leading the leaders, and the fourth (the appellant) was engaged as brakesman. (5) There are two brakes on this lorry, one for each of the back wheels, which can be applied only by a man on the ground behind the lorry, and are manipulated by two turning screws, one for each of the brakes. (6) There may be periods, long or short, during which the application of the brake is not required; but it is the duty of the brakesman in such circumstances to walk continuously at the rear of the lorry, ready to apply the brakes —by means of which alone the pace of the lorry can be controlled—not only on the slightest incline, but also in the event of any emergency, such as the breaking of a trace, the fall of a horse, or any similar accidental occurrence. The appellant might use his own discretion as to the use of the brakes; but he was also bound to obey the instructions of the driver of the wheelers, who had authority to order him to apply and release the brakes as he should require. (7) It is a rule of the respondent's business that in such circumstances as those of the present case no carter accompanying the lorry is to ride on the lorry with the exception of the carter driving the wheelers. The appellant was well aware of this rule, and was familiar with the duties of his employment as brakesman, and in particular was well aware that he could not fulfil these duties while riding on the lorry. (8) On the morning in question, while the said lorry was proceeding with its load towards Glasgow, and at a point of the road near Bellahouston Park, the appellant jumped on to the lorry, and sat down at the front, on the near side, by the driver, with whom he entered into conversation about matters which had nothing to do with the work on hand. The driver made no objection to his riding on the lorry. (9) When the lorry had proceeded along the road for a quarter of a mile beyond Bellahouston Park, the driver found it necessary to turn into Copeland Road on his near side. (10) As he made to turn the corner the driver shouted to the appellant to put on the brakes, whereupon the appellant made to jump off the lorry with the intention of obeying these instructions, when in some way he slipped on the lorry and fell to the ground, and his left foot was caught by the front near wheel of the lorry and so severely crushed that it had subsequently to be amputated. (11) While on the lorry the appellant was unable to perform the duties of his employment as brakesman, and thus voluntarily, and for his own purposes, put himself in a

position in which he could not attend to his said duties, and from which he could not descend without risk of such an accident as actually occurred."

The Sheriff-Substitute further stated—"In these circumstances I found in law that the accident did not arise out of and in the course of the appellant's employment, in the sense of the statute."

The *question of law* was—"Whether on these facts the arbitrator was right in holding that the accident did not arise out of and in the course of the appellant's employment in the sense of the statute?"

Argued for appellant—The accident arose out of the appellant's employment, for he was in the course of his employment and obeying instructions at the time. It was immaterial that immediately prior thereto he had been sitting on the cart. Reference was made to the following cases—*Johnson* v. *Marshall, Sons, & Company, Limited*, [1906] A.C. 409; *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242; *Hendry* v. *United Collieries, Limited*, [1910] S.C. 709, 47 S.L.R. 635; *M'Lauchlan* v. *Anderson*, February 1, 1911, 48 S.L.R. 349; *Douglas* v. *United Mineral Company, Limited*, 1900, *vide* Elliott's Workmen's Compensation Act 1906, p. 32.

Argued for respondent—The appellant's accident did not arise out of the employment, for he voluntarily chose to encounter a risk not within the contemplation of parties or incidental to the employment. He had broken a rule, and it was in connection with that breach that the accident took place. The appellant therefore had no claim to compensation—*Smith* v. *Lancashire and Yorkshire Railway Company*, [1899] 1 Q.B. 141; *Morrison* v. *Clyde Navigation Trustees*, 1909 S.C. 59, *per* Lord M'Laren 46 S.L.R. 40; *Brice* v. *Edward Lloyd, Limited*, [1909] 2 K.B. 804; *Kane* v. *Merry & Cuninghame, Limited*, February 7, 1911, 48 S.L.R. 430; *M'Daid* v. *Steel*, 48 S.L.R. 765.

LORD PRESIDENT—In this case the learned Sheriff has stated very clearly the facts which he holds proved. The applicant for compensation was a carter. He was employed on the day on which the accident happened in assisting three other carters in the transport of a very heavy casting which was laid on a lorry drawn by five horses, and the particular scope of his employment was to look after the two rear screw brakes which were upon the lorry. When he was to put on or take off the brakes he was under the orders of the man who was driving the wheelers, and his proper place was somewhere where he could get at the brakes, which meant somewhere on the road near the rear of the waggon. The brakes were of course situated in such a position that they could not be put on by a man sitting on the lorry, and this man should have been walking behind the lorry so that he could get immediate access to the brakes when necessary. On the morning of the accident, while the lorry was proceeding, he went and seated himself on the front of the lorry and began to talk to the driver on various subjects. While he was sitting there the driver came to a turn where he wished the brakes to be applied, and he called to the applicant to put on the brakes. The applicant then jumped off from the seat where he was sitting on the front of the lorry and slipped as he did so, with the result that the front wheel of the lorry went over him.

Now the Sheriff-Substitute has held as arbitrator that the accident did not arise out of the applicant's employment, and we are asked in this appeal to hold that he was wrong. I do not think that we can hold that he was wrong. I think there are ample facts to support his finding. I shall assume that so far as the general operation is concerned of going with the lorry, and so far as the time element therein is concerned, that this accident happened at a time when the applicant was in the course of his employment. But did the accident arise out of his employment? I think it did not; and I think it did not because I do not think the accident was the result of the order to go and turn on the brakes. The accident was the result of his being in a place where he had gone, not for the purposes of his employment but for his own purposes, and where the danger which he thereby incurred was a danger which was not ordinarily incidental to his employment.

I cannot do better, I think, than borrow the words of Lord Justice Kennedy in the case of *Brice* v. *Lloyd*, [1909] 2 K.B. 804, where he says, speaking of a case where the accident arose out of and in the course of the employment—"The test is whether the risk of the accident is one which may be reasonably looked upon as incidental to the employment." Now I think this risk was not incidental to the employment. I think it was an added risk, and it seems to me that a workman has no right by his own conduct for his own purposes to add a risk which is not incidental to the employment in which he is engaged. The employment in this case was to attend to the brakes, and the whole risks incidental to that employment did not include the risk of having to jump down from the front part of the lorry while it was in motion. Being on the front part of the lorry and jumping down, was no part of his employment. He had no business to be there. I do not put it that that was disobedience, but simply that it was not part of his employment, and therefore I think that the learned Sheriff's decision here is right.

LORD KINNEAR—I am entirely of the same opinion. The facts which the Sheriff finds and by which we are bound are that this man's employment as a brakesman required him to walk continuously at the rear of the lorry, ready to apply the brakes upon any emergency or upon the slightest incline; that he was not employed to ride on the lorry, but on the contrary was expressly forbidden to do so; that for his own pleasure he upon this occasion got

upon the lorry and took a seat upon the front by the driver, with whom he began to talk about matters which had nothing to do with the work on hand. While he was in that position the driver called upon him to put on the brakes. Then he tried to jump off the lorry, which was in motion, with the intention of obeying these instructions, but he slipped and fell to the ground, and his left foot was caught by the front wheel of the lorry. I think that in putting himself in front of the lorry contrary to orders, and in such circumstances that he might be required to jump down while the lorry was in motion, he created a risk to himself which was not incidental to his employment. It was a new risk incurred voluntarily by the man himself. Whether he could be charged with serious and wilful misconduct in so doing is a totally different question. But he was not employed to do anything of the kind.

LORD MACKENZIE—I am of the same opinion. The facts, which are very distinctly stated by the Sheriff-Substitute, are in my opinion amply sufficient to warrant the conclusion which he has reached. They show that the workman, who was employed as a brakesman, got on to the front of the lorry in order to get a drive instead of walking at the rear, the only place where he would have been in a position to fulfil his duties as brakesman. The accident happened in consequence of his being in front for purposes of his own. The risk of that accident cannot reasonably be looked upon as incidental to his employment.

LORD JOHNSTON was absent.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for Appellant—Sandeman, K.C. —M'Robert. Agents — Fyfe, Ireland, & Company, W.S.

Counsel for Respondent—Horne, K.C.— Duffes. Agents—Erskine Dods & Rhind, S.S.C.

Friday, June 2.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

BREMNER *v.* DICK AND ANOTHER.

Sale—Sale of Heritage—Misrepresentation —Feu-Duty.

The missives of sale of a villa stated that the feu-duty was £2, 5s., but did not disclose that the said feu-duty was merely the rateable proportion applicable to the subject sold of a *cumulo* feu-duty of £4, 8s. In an action by the seller for payment of the price, or alternatively for damages for breach of contract, the Court assoilzied the defenders, *holding* that the pursuer did not obtemper his part of the contract by offering to convey a subject the feu-duty of which was not £2, 5s. but a share of a feu-duty of larger amount.

Nisbet v. *Smith*, June 6, 1876, 3 R. 781, 13 S.L.R. 493; and *Robertson* v. *Douglas*, July 9, 1886, 13 R. 1133, 23 S.L.R. 794, *distinguished* and *commented on*.

Question (*per* Lord Johnston) whether a mere statement of feu-duty, meaning thereby the immediate or sub-feu-duty, is sufficient notice to a buyer of the existence of a substantial over-feu-duty.

On 3rd January 1910 John Bremner, measurer, 28 Orchard Drive, Giffnock, *pursuer*, brought an action against Mrs Sophie Campbell Armour or Dick, wife of and residing with Robert Orr Dick, 8 Orchard Drive there, and the said Robert Orr Dick as her curator and administrator-in-law, *defenders*, in which he sought to have the defender (Mrs Dick) ordained to implement her part of certain missives of sale whereby the pursuer sold and the defender purchased part of a double villa in Orchard Drive aforesaid, and that by making payment to the pursuer of the sum of £830—under deduction of the pursuer's share of the expenses of the conveyance—in exchange for a valid disposition of the subject. Alternatively the pursuer claimed £200 in name of damages.

The defender, *inter alia*, pleaded—"(2) In respect that the pursuer has not tendered a valid title and fulfilled the other conditions of the contract averred, the action is premature and unnecessary, and ought to be dismissed. (4) The defenders are entitled to be assoilzied, in respect (1st) that the defender Mrs Dick has not refused or delayed to implement her part of the missives founded on; and (2nd) that pursuer is unable to implement his part of said missives."

The *facts* appear from the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 15th July 1910, after a proof, sustained the second head of the defenders' fourth plea-in-law, and assoilzied them from the conclusions of the summons.

Opinion.—"This is an action by a seller against a purchaser concluding for specific implement of the contract of sale, or alternatively for damages for breach of contract; and the question which I have to decide after a proof is, whether the defender has succeeded in establishing the second branch of her fourth plea-in-law, which is to the effect that the pursuer is unable to implement his part of the missives of sale. The subject of the sale was the eastmost half of a double villa in Giffnock, and the missives stated 'that the feu-duty' was £2, 5s. It now appears that the pursuer is unable to obtain from the superior an allocation of the feu-duty of £2, 5s. upon the subjects sold, but the superior has allocated £4, 8s. upon the portion of the original feu on which the double villa built by the pursuer stands. This sum represents one-half *plus* 10 per cent. of the feu-duty of £8 reserved in the original feu-charter. The result is that the subject sold and the westmost half of the double villa—retained by the pursuer