the effect, if any, in Scotland of section 75 of the Housing of the Working Classes Act 1890 (53 and 54 Vict. cap. 70), which applies only where the rent is under £4.

From the foregoing statement of the law it would seem that an issue of fault is very appropriate in an action like the present one. It is usual, however, in actions by workmen against employers, which also are really based on breach of contract, that the issue should put the question whether the pursuer was injured while in the employment of the defender. In the present case I think that the defenders are entitled to have the issue in such a form as will remind the judge and jury of the true character of the claim, and accordingly I suggest that the issue, if granted, should be amended so as to read as follows — "Whether, on or about 26th January 1910, the pursuer, while tenant under the defenders of the dwelling-house No. 11 Broughton Place, Edinburgh, was injured in his person by falling down the stair in said dwelling-house through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Though the case of *Laurent* v. *Lord Advocate*, 1869, 7 Macph. 607, was not one of personal injury, the opinion of Lord President Inglis (p. 609) supports the view that the issue should be different from one founded on delict or quasi-delict. In the present case, however, I prefer the issue which I have suggested to one constructed on the model of the older forms used in cases where no claim was made in respect of personal injuries, such as *Graham* v. *Graham*, 1841, 3 D. 479; *Brakening* v. *Menzies*, 1841, 4 D. 274; and *Budge* v. *Balfour*, 1852, 14 D. 943.

As regards the relevancy of this particular action, it was objected (1) that the parties could not have contemplated that the pursuer would use the railings in the manner described, and that accordingly his injuries were not a natural consequence of the defenders' failure to repair, and (2) that from the pursuer's own averments it appeared that he had accepted the risk of the defective stair—*Smith* v. *Baker*, 1891, A.C. 325. These are both questions of fact, which if the case goes to trial must be decided by the jury. I cannot hold the pursuer's averments irrelevant as regards these two matters.

The LORD JUSTICE-CLERK concurred.

LORD ARDWALL and LORD DUNDAS were absent.

The Court adhered, and approved of the issue as thus amended—"Whether, on or about 26th January 1910, the pursuer, while tenant under the defenders of the dwelling-house No. 11 Broughton Place, Edinburgh, was injured in his person by falling down the stair in said dwelling-house, through the fault of the defenders, to the loss, injury, and damage of the pursuer."

Counsel for Pursuer (Respondent)—Crabb Watt, K.C. — J. B. Young. Agents — Robertson & Wallace, S.S.C.

Counsel for Defenders (Reclaimers) — Sandeman, K.C.—Lord Kinross. Agents—Guild & Shepherd, W.S.

Saturday, July 1.

SECOND DIVISION.

[Sheriff Court at Linlithgow.

MURRAY *v.* DENHOLM & COMPANY.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 — "*Accident arising out of*" *the Employment — Workmen Engaged to Take Place of Workmen on Strike—Assault by Workmen on Strike.*

The employees in a woodyard having gone out on strike, other workmen were brought in to take their places. The strikers made an attack on the works and assaulted and threw stones at the workmen there employed. One of the workmen so injured claimed compensation under the Workmen's Compensation Act 1906.

Held that his injury was not injury "by accident" within the meaning of section 1 of the Act.

Opinions (*per* Lord Justice-Clerk and Lord Salvesen) that even if the injury were injury "by accident," the "accident" did not arise out of the employment.

Opinion contra per Lord Dundas.

Nisbet v. *Rayne & Burn*, 1910, 2 K.B. 689, and *Anderson* v. *Balfour*, 1910, 2 I.R. 497, *disagreed with.*

In an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of Linlithgow, between James Murray, *respondent*, and John Denholm & Company, *appellants*, the Sheriff-Substitute (MACLEOD) awarded compensation and at the request of Denholm & Company stated a case for appeal.

The admitted *facts* were shortly as follows:—On 27th May 1910 the employees in the Bo'ness woodyards, including that belonging to the appellants, came out on strike. Arrangements were then made by the employers for the supply of men from Glasgow to take the place of the strikers. And on 30th May 1910 a batch of men, including the respondent, arrived at Bo'ness and were distributed among the various woodyards, including the appellants'. During the course of the day the strikers assembled in considerable numbers near the appellants' woodyards, which were situated beside the station and adjoined those of Messrs Harrower, Welsh, & Company. About two o'clock, the strikers, after repeated attempts to get at the imported workers, broke through the police ranks, entered the various yards, threw missiles at the imported labourers, and attacked and assaulted several of them, including the respondent. Work was accordingly stopped and the imported labourers sent back to Glasgow. On 31st May 1910 another batch of imported

labourers, numbering at least 315, including the respondent, arrived at Kinneil Station at 6 in the morning and were distributed between the yards of appellants and Messrs Harrower, Welsh, & Company, where they continued to work till about 10 o'clock. About that hour a procession of strikers and their sympathisers marched from Bo'ness to Kinneil, numbering fully 2000 people, many of them armed with various kinds of weapons. When the strikers arrived at the woodyards, in view of their threatening attitude and of the danger involved to the imported workmen, work was stopped, and the men employed by Messrs Harrower, Welsh, & Company in their yard were brought into defenders' yard, so that they might be nearer the railway station and could be entrained for Love & Stewart's yard at Bo'ness, where better protection could be given. The strikers rushed the police guarding the defenders' yard and threw various kinds of missiles at the workers and assaulted them. The imported workers made no resistance. They were, in fact, told by the police not to retaliate. Several of the workers, including pursuer, were injured. The pursuer sustained certain injuries to his head, face, and jaw, and to his shoulder and arm. He received the said injuries while in the employment of the defenders and while the work was temporarily stopped as above narrated. He was incapacitated from following his usual occupation for one month, at the end of which time his incapacity ceased. On 28th July 1910 six of the strikers were sentenced by the High Court of Justiciary at Edinburgh to a term of imprisonment for mobbing and rioting on 31st May 1910, as above condescended on.

On these facts, and on the authority of *Nisbet* v. *Rayne & Burn*, 1910, 2 K.B. 689, and *Anderson* v. *Balfour*, 1910, 2 I.R. 497, the Sheriff-Substitute found in law that the injury to the respondent was "injury by accident," and that the accident had arisen out of and in the course of the respondent's employment with the appellants, and involved compensation.

The following *questions of law* were stated—"Whether as an arbitrator under the Workmen's Compensation Act 1906, I was justified on the foregoing facts in finding—(1) That the injury described was 'injury by accident;' and if so, (2) That the accident arose out of the respondent's employment with the appellants; and if so, (3) That the accident also arose in the course of that employment."

Argued for the appellants—(1) The injury which resulted in the incapacity of the respondent was not "injury by accident" within the meaning of section 1 of the Act. It was well settled that accident must be taken in its popular and ordinary sense, and denoted "an unlooked-for mishap or an untoward event which is not expected or designed."—*Fenton* v. *Thorley & Company, Limited*, 1903 A.C. 443; *Brintons, Limited* v. *Turvey*, 1905 A.C. 230; *Clover, Clayton, & Company, Limited* v. *Hughes*, 1910 A.C. 242, at pp. 244, 247; *Ismay, Imrie, & Company* v. *Williamson*, 1908 A.C. 437. The injuries sustained by the respondent were not the result of an unlooked-for mishap, and were not undesigned or unexpected. They were caused by a deliberate and designed act, which could certainly not be described as an accident in the ordinary and popular sense of the word.—*Collins* v. *Collins*, 1907 2 Ir. R. 104; *M'Intyre* v. *Rodger & Company*, December 1, 1903, 6 F. 176, 41 S.L.R. 107, *per* Lord Young at p. 179, p. 109. The case of *Challis* v. *London and South-Western Railway*, 1905, 2 K.B. 154, was quite consistent with this view, because there the injuries though caused by a wilful and intentional act were not the designed or expected result of that act. The cases of *Nisbet* v. *Rayne & Burn*, 1910, 2 K.B. 689, and *Anderson* v. *Balfour*, 1910, 2 I.R. 497, were not binding on the Court, and they were not consistent with the definition of accident in *Fenton* v. *Thorley & Company, Limited* (*cit.*), and approved in subsequent cases. (2) Even if the cause of the respondent's injuries were an accident, it did not arise out of the employment. The injuries were not the result of anything in a reasonable sense incident to the employment, but were caused by the tortious act of a third party which had no relation to the employment, and for injuries so caused compensation could not be claimed—*Armitage* v. *Lancashire and Yorkshire Railway Company*, 1902, 2 K.B. 178; *Fitzgerald* v. *W. G. Clarke & Son*, 1908, 2 K.B. 796; *Burley* v. *Baird & Company, Limited*, 1908 S.C. 545, 45 S.L.R. 416; *Wilson* v. *Laing*, 1909 S.C. 1230, 46 S.L.R. 843; *Falconer* v. *London and Glasgow Engineering, &c., Company*, February 23, 1901, 3 F. 564, 38 S.L.R. 381, *per* Lord Trayner at p. 567, p. 382; *Murphy* v. *Berwick*, 1909, 126 L.T. 424, 43 Ir.L.T. 126.

Argued for the respondent—The injuries sustained by the respondent were the result of accident. Accident of course must be taken in the ordinary and popular sense, *Fenton* v. *Thorley & Company, Limited* (*cit.*), but if the incident was looked at from the point of view of the respondent he might be said in the ordinary and popular sense to have been the victim of accident. Wilfulness on the part of a third party did not necessarily take the incident out of the category of "accident." It would be contrary to the spirit of the Act to exclude from the benefits a workman who was the victim of violence. Both in England and in Ireland this view had been countenanced—*Nisbet* v. *Rayne & Burn* (*cit.*); *Anderson* v. *Balfour* (*cit.*)—and it was not desirable that the law in Scotland should be different. Further, the fact that a policeman was specially excluded by section 13 from the operation of the Act pointed to an intention to compensate for injuries caused by violence. In *M'Intyre* v. *Rodger & Company* (*cit.*), and *Burley* v. *Baird & Company, Limited* (*cit.*), the injuries were the result of wilful act, and yet it was not questioned in these cases that they were "injury by accident" within the meaning of the Act, for the decisions proceeded on the view that the accident did not arise

out of the employment. Further, in the present case the respondent's injuries did not result from an act intended or designed to inflict on him personally any injury. He was one of a certain number who happened to be injured in the general attack made by the strikers. The dicta in the House of Lords relied on by the appellants were not inconsistent with this view of the Act. (2) The accident arose out of the employment. The risk of such injuries as the respondent sustained was certainly incidental to the employment—*Nisbet* v. *Rayne & Burn* (*cit.*); *Anderson* v. *Balfour* (*cit.*)—and that risk was clearly within the contemplation of both parties on 31st May in view of the occurrences on the previous day. The employment of the respondent was just what exposed him to the risk—*M'Neill* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15.

At advising—

LORD JUSTICE-CLERK—This case arises out of certain incidents which took place during strike riots in Bo'ness. The workman who was injured was brought to the appellants' yard to do work in consequence of those ordinarily employed there having gone out on strike. Those who were on strike resorted to violence to intimidate the imported workmen. They broke through the ranks of the police who were endeavouring to protect the yards where the imported men were at work, and obtaining forcible entrance into the yard threw missiles at and assaulted them, and succeeded in stopping the work. The respondent, who was an imported worker, was assaulted and injured in the yard, and his injuries incapacitated him from working. He accordingly claimed compensation under the Workmen's Compensation Act, and this has been awarded to him in the Arbitration Court by the Sheriff-Substitute.

The decision in law therefore is that a master is liable to pay compensation to a workman as for an injury caused by an accident, when the injury was caused by a criminal assault, committed by persons who forced their way into the place where he was working, and unlawfully and maliciously used personal violence to him for purposes of intimidation, to compel him to desist from exercising his lawful calling by doing work for a master by whom he was lawfully employed. Such injury is said to be an accident within the meaning of the Act.

But for the fact that certain decisions have been pronounced in England and in Ireland, by which injury maliciously inflicted, in one case to the result of murder, was declared to be accidental, I should have had no difficulty in holding that the wilful and malicious violence committed upon the respondent in the circumstances I have enumerated could not be held to be an accident in any reasonable interpretation of that word according to the sense in which it is used in the ordinary language of the day. In this very case those who committed the violence were tried and convicted of crime. If they could have maintained that the word "accident" had any reasonable application to the injuries they inflicted, then there would have been no crime.

It is very desirable to find, if it be possible, some authoritative definition of accident as the word occurs in the statute, and this, I think, is to be found in a case in the House of Lords (*Fenton* v. *Thorley & Company* [1903] A.C. 443); in an opinion of Lord Macnaghten, in which the other noble and learned Lords concurred. His words were —"I come to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." These words are clear and free from ambiguity, and, as it appears to me, they are quite inconsistent with—indeed contrary to—the sense put upon the word in the two cases on which the Sheriff-Substitute has based his judgment. Can it be said that these judgments, in applying the word "accident" to an incident of wilful crime, are giving to it its popular and ordinary meaning? I cannot think so. In ordinary and popular language the word "accident" excludes wilful intent to do injury on the part of the person by whose act the injury is caused, whether that person be the injured individual himself or another person who maliciously injures him. A witness who sees an injury inflicted will declare it to have been accidental or intentional, according to what he observes. It is the quality of the act, and not some relation in which the injured person stands as regards employment which determines the question whether what was done was accidentally or wilfully inflicted. To say that if a man comes into a place where a workman is employed and assaults and injures and perhaps murders him (a case figured by Lord Young in *M'Intyre* v. *Rodger & Company*, 6 F. 176) is a crime and not an accident if the man is acting from mere personal spite, but that it is an accident if done to intimidate the workman and drive him out of his employment, is in the former case to use the word in its ordinary and popular meaning, and in the latter to refuse to do so, and to apply it in a sense which is contrary to ordinary and popular understanding. Such an interpretation is therefore directly contrary to the first part of Lord Macnaghten's definition.

Then again it is to be observed that when Lord Macnaghten speaks of an "untoward event" he speaks of it as being one that is "not expected or designed." He therefore clearly excludes from his exegesis of "accident" something which is designed. Now can it be said that when a man stabs another or shoots another that that is mishap or untoward event "not designed?" Lord Macnaghten's definition plainly means that an injury inflicted by design is not an accident. That which is designed is the antithesis of that which is accidental.

When therefore it has been held that an act of wilful murder is an accident within the statute, if the murder is inflicted

in order to enable the murderer to rob a servant who is carrying his master's goods or money, the decision was in my opinion directly contrary to Lord Macnaghten's definition. What happened was an event designed. It had no single feature resembling accident in the "popular and ordinary sense of the word." Is it conceivable that any human being would think of applying the word "accident" to such an occurrence? Is it conceivable that it would enter anyone's mind to speak of "accident" in such a connection? In deciding that a man who was murdered died by an accident the Court which gave the decision must have applied the word in some special meaning far away from any popular or ordinary understanding of the expression. Indeed, in the case of *Nisbet*, [1910] 2 K.B. 689, one of the Lords Justices of Appeal stated in distinct terms that he did not take the word in any "popular and ordinary sense." He put it as certain that "the description of death by murderous violence as an accident cannot honestly be said to accord with the common understanding of the word wherein is implied a negation of wilfulness and intention." This is exactly expressing Lord Macnaghten's view in different words. But what the learned Judge goes on to say amounts to a rejection of the interpretation according to the usual and current meaning attached by every English-speaking person to the word "accident," and indeed he expresses himself as bound not to take the word in its popular and ordinary sense. "But," he says, "I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm,' than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it." I candidly confess that I do not follow the reasoning of the learned Judge. Either the Legislature expressed one thing or another. Why there should be any need to stretch a meaning I cannot understand; and why Parliament should be supposed to have used a word which is used daily in statutes, in law proceedings, and in ordinary parlance with the intention (which it has not expressed) that it should have a different meaning from that which is in universal acceptance by all who speak our language, I cannot understand.

Even if there were no authority on the point in the decision of our own Court in cases similar to the present, I should have felt myself unable to decide this case in accordance with the English judgment in the case of *Nisbet*. The Irish case of *Anderson* v. *Balfour*, [1910] 2 Ir. R. 497—the case of the gamekeeper who was injured in consequence of violence by a poacher—stands in a somewhat different position. It may plausibly be said that violence at the hands of poachers is a thing contemplated in such a service as that of a gamekeeper, who is supposed to face encounters with poachers, who, it is known, often proceed to personal violence when interfered with. But I am unable to agree that that case was well decided. I concur in the dissent so well, as I think, stated by Lord Justice Cherry. What happened to the gamekeeper was not, in the sense of Lord Macnaghten's definition, an accident. The injury was caused by a malicious and criminal act, in no reasonable sense accidental.

These decisions in England and Ireland are not binding on this Court, and we are bound to form our own judgment on any case that comes before us. Such decisions must be, and always are, considered with respect, as forming a forcible part of the argument of the party founding on them. But if we are not satisfied with the soundness of the argument, we must exercise our responsibility and form our own judgment. Of course, if these cases had come before the House of Lords and the judgments had been affirmed, we should be bound to give effect to the views of the highest tribunal of law in the kingdom. To me it is difficult to conceive that, as long as Lord Macnaghten's dictum stands, the House could decide that an act of direct crime causing an injury could be followed by an award of compensation to the victim of the crime as for an accidental injury. If this should be held in a case similar to the present, of course we would have to bow to the decision of the highest legal authority. In the meantime it is our duty, I think, to follow the course of the decisions in our own Courts. Now I find in none of them any authority for the proposition that a workman injured by a criminal act of violence inflicted on him can obtain compensation from his master as for an accident. On the contrary, the whole trend of the judgments given is adverse to any such idea. If there was a series of decisions making it plain that the Scottish bench had adopted the doctrine laid down in the Court of Appeal in England, I should, contrary to my own judgment, accept the law as so authoritatively laid down. But I cannot find any decision which can be said even to tend in that direction.

One case occurring in England calls for special notice—the case of *Challis*, [1905] 2 K.B. 154—which, as it appears to me, affords an illustration of what may be held to be an accident, although there was an element of wilfulness involved. In that case some boys dropped a stone over the side of a bridge as an engine was passing underneath, intending to try to drop it into the funnel. It struck and broke the window of the weather-board, and drove some broken glass into the engine-driver's eye. This was held to be an accident, there being no intention to injure, and the offender being a young boy. I think such a decision might be held to be reasonable, just as I think it would be reasonable to hold that an injury caused to a platelayer by the thoughtless throwing of an emptied bottle out of a train might be held to be caused by accident. The doing of a foolish thing may be held not to be designedly

done to cause injury. This was illustrated by the case of *M'Intyre* v. *Roger & Company*, where a workman whose brush was being used by another, took it hastily out of his hand and caused an injury. That was properly held to be an accident. It was a result not contemplated or intended. It is worthy of note that in the case of the engine-driver it was indicated from the bench that the decision in such a case might be different if the thrower of the stone was a grown-up man, there being reason to infer real malicious intent and not mere thoughtlessness when a man who has reached years of discretion does such an act. In the case of a grown-up man it might be held to be "designed."

I conclude what I have to say on the question of accident by quoting the words of Lord Justice Cherry in the case of *Anderson*, which seem to me to express the matter tersely and accurately—"In every-day language of educated people an effect is said to be accidental when, and only when, the act by which it is caused is not done with the intention of causing it."

Assuming that I am wrong on the question whether what occurred when the respondent was injured was an accident, the next question would be, did the injury arise out of the employment? On that question I feel constrained to hold that it did not so arise. In so holding I am fortified by the decisions in the cases of *Falconer*, 3 F. 564, and *Armitage*, [1900] 2 K.B. 178. In the first case two fellow-workmen, while on the master's premises, engaged in sport, and one of them inadvertently knocked the claimant over. It was held that the accident did not arise out of his employment, and that the master was not liable to compensate him for the injury. This view was also taken later in the case of *Fitzgerald*, [1908] 2 K.B. 796, in the King's Bench. The case of *Armitage* was an English case before the Court of Appeal. The facts were, that a workman threw a piece of iron at a fellow-workman, and unfortunately the iron struck another man in the eye. The Court held that what happened did not arise out of the employment, and that therefore no compensation was due. In the present case the injury was not the act of a fellow-workman. It was the act of persons who had given up their situations for reasons of their own, and who with the intention of doing violence forced their way into the premises, and having forcibly overcome the police, proceeded to do violence to persons lawfully there. In these circumstances how can the injury suffered by the respondent be held to have arisen out of his employment? He was lawfully employed, he was within the enclosed premises of his master, he had the protection of the police. It was only by the persistent violence of the strikers that he came into any danger. That they desired to drive him out of his employment is certain. They were venting their ill-will on him, because he chose to accept employment and to work perfectly legally, and in the due exercise of personal liberty. Is it to be held that in every case where violence or bloodshed are resorted to in disputes as to wages, such violence and bloodshed are to be held to arise out of the employment of the injured party? Of course, in a sense, it is the fact of his employment that induces the malicious persons to do him injury. But while the injury is done because he has undertaken the employment it does not arise out of the employment. It arises out of the frame of mind of the attacker, whose act is malicious and criminal.

I confess I see no resemblance between the present case and the cases of *Nisbet* and *Anderson*. In these cases, whenever it was held that they were cases of accident, it was not possible to do otherwise than hold that the accident arose out of the employment. The servants' injuries were inflicted to defeat their care of their master's interests. Here, if the injuries were caused by accident, they were in no sense incidental to the employment, or arising out of its execution. The respondent being in the employment may have provoked the persons to malice and led them to do the injuries, but the injuries themselves—that is, the practical effects of the so-called accident—in no way arose out of the employment.

I would propose to your Lordships to answer the first two heads of the question in the negative, and to find that it is unnecessary to answer the third head.

LORD DUNDAS—This is a Stated Case under the Workmen's Compensation Act 1906. The material facts were admitted by the parties and are set forth in the case. Shortly put they amount to this, that on the occasion in question the respondent was brought down to Bo'ness along with a number of other workmen to the appellants' woodyard to replace the ordinary workers who had gone out on strike. The strikers and their sympathisers assembled in great force, invaded the yard, forcing their way past the police, and threw various kinds of missiles at, and assaulted, the imported workmen, who made no resistance, being in fact told by the police not to retaliate. The respondent, among others, suffered injuries, and he seeks compensation from the employers.

The Sheriff-Substitute quite properly recognised that in order to the respondent's success three elements are necessary, viz., (1) that he sustained personal injury by accident, (2) arising out of and (3) in the course of his employment. No question arises upon the third head, for it is not disputed that the injuries were sustained in the course of the employment. The Sheriff-Substitute found in the respondent's favour upon the other two heads, his decision on the first being based upon two cases, English and Irish respectively, which he cites.

One must consider and determine therefore, in the first place, whether the facts disclose an "injury by accident" within the meaning of the Act. At first sight the

problem appears to be a very simple one. I do not suppose that it would occur to the mind of any ordinary and unsophisticated person, unacquainted with the subtleties and refinements of the law courts, to affirm that the respondent's injuries were the result of an accident. I do not doubt that such a person would unhesitatingly say that they were the result of no accident, but of a deliberate and intentional assault delivered by the strikers upon the respondent and his companions. If, then, the true test (or at least a crucial test) of the matter is whether or not we have here a case of injury by accident according to the ordinary and popular use of language, the question could, I think, only be answered in one way. But the matter requires careful and serious consideration, for the language of the Act has been repeatedly construed in the law courts; and if the result which at first sight seems so clear and simple is to be arrived at, it must, I am afraid, be in the teeth of some of the reported decisions, particularly of those referred to by the Sheriff-Substitute.

The leading case on the point is *Fenton* v. *Thorley & Company, Limited*, 1903 A.C. 443. The workman there was employed to look after one of the machines used in preparing Thorley's food for cattle, and had in the course of his duty to move a lever and turn a wheel. The wheel proved to be stiff, and in endeavouring to make it turn the man ruptured himself. The House of Lords (reversing the Court of Appeal) unanimously held that he had suffered an injury by accident within the meaning of the Act. Lord Macnaghten gave the leading opinion, and in the course of it said—"I come therefore to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." This important pronouncement was substantially concurred in by the other noble and learned Lords, and has on subsequent occasions been approved and adopted by the House. The first portion of it establishes (what is of vital moment in this case) that the Act must be held to use the word accident "in the popular and ordinary sense of the word." The remainder of the quotation, if one treats it as a definition of "accident," seems to me to be unexceptionable and well qualified to hold the field, at all events until a better definition is propounded. In the later case of *Clover, Clayton, & Company*, [1910] A.C. 242, Lord Macnaghten thus commented on what was laid down in *Fenton's* case—"It was held that 'injury by accident' meant nothing more than 'accidental injury' or 'accident' as the word is popularly used. It is not perhaps quite accurate to say that in that case a definition of the term 'accident' was hazarded. It would be more correct to say that the decision was that the word 'accident' was to be taken in its ordinary and popular sense. Some of the noble and learned Lords who gave judgment explained what they understood to be the ordinary meaning of the word, and I cannot but think that the explanations given, varying slightly in expression, are substantially correct." I will only add two observations before leaving *Fenton's* case. In the first place, I gather that Lord Macnaghten was anxious to make it clear, in answer to an argument strenuously maintained by the respondent's counsel, that the idea of accident is not necessarily excluded because a workman deliberately and intentionally does that which leads to injury; Fenton intended to do his utmost to make the wheel turn, but he did not intend in doing so to rupture himself; his injury was thus an accident though his act was deliberate. In the second place, Lord Macnaghten's use of the word "designed" cannot, I think, mean designed by the workman, for an injury so designed would obviously be no accident, nor any basis for compensation, but must refer to the design of someone else, so as, *prima facie* at least, to exclude from the sphere of accident an injury designedly inflicted on the workman by an outside party. The next case in the House of Lords was *Brinton & Company, Limited*, [1905] A.C. 230, generally known as the "anthrax case." That decision extended, I think, the application of injury by accident to a wider field than was covered by previous cases, and Lord Robertson strongly dissented from the judgment. But the important point to note for present purposes is that the Lords again affirmed in no uncertain manner that "the language of the statute" (as Lord Chancellor Halsbury put it) "must be interpreted in its ordinary and popular meaning." Lord Macnaghten expressed himself content to abide by what he was reported to have said in *Fenton's* case, with the express concurrence of Lords Shand and Davey and the approval of Lord Lindley. Lord Lindley observed that "the meaning of the word" (accident) "as used in the Workmen's Compensation Act was settled by this House in *Fenton* v. *Thorley & Company, Limited.*" Again, in *Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437, the "heatstroke" case, the same criterion was applied. The Lord Chancellor (Loreburn), after referring to *Fenton* as "a conclusive authority," said—"In my view this man died from an accident. . . . It was an unlooked-for mishap in the course of his employment. In common language it was a case of accidental death." Lord Ashbourne spoke to a similar effect; and though Lord Macnaghten dissented upon the particular facts of the case, the test he applied was the same—"Was that an injury by accident in the ordinary sense of the expression? I think not." Lastly, in *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242, the rubric bears that a workman suffering from serious aneurism was employed in tightening a nut by a spanner when he suddenly fell down dead from rupture of the aneurism. The County Court Judge found upon conflicting evidence that death was caused by a strain arising out of the ordinary

work of the deceased, operating upon a condition of body which was such as to render the strain fatal. The House of Lords held (by a majority of three to two) that there was evidence to support the finding, and that it was a case of "personal injury by accident arising out of and in the course of the employment" within the meaning of the Act of 1906. The divergence of opinion among the noble and learned Lords arose upon the very peculiar facts of the case, with which we have nothing to do. But I think the law, so far as here material, was laid down by all their Lordships in the same sense as in the three cases I have referred to. The Lord Chancellor (Loreburn) referred to Lord Macnaghten's "definition" of "accident" in *Fenton's* case as "conclusive." Lord Macnaghten, from whose opinion I have already quoted, said he had "no doubt that there was an accident in the popular sense of the word." Lord Atkinson (a dissentient) expressly accepted the meaning put upon the word accident in *Fenton* v. *Thorley* as applicable in all cases turning on the construction of the phrase "injury by accident" used in the Act of 1906. Lord Collins said—"I agree with the Court of Appeal that the case is concluded by the authority of *Fenton* v. *Thorley*." Lord Shaw of Dunfermline dissented strongly from the judgment, on the ground that the man's death was caused, not by accident, but by pre-existing disease; but I do not find that he in any way repudiated the view that "accident" is to be understood in its ordinary and popular sense.

Applying the criterion thus repeatedly propounded by the House of Lords to the facts of the present case, there seems to me to be no difficulty in holding that there was not here an "injury by accident" according to the popular use and meaning of the word, and the sense indicated by that House in the decisions referred to. But one must not leave out of consideration other cases, notably the two cited by the Sheriff-Substitute—both of which are later in date than any of the House of Lords cases, and are indistinguishable from the present case—and which were decided in a sense contrary to that which I have indicated. These decisions are not binding upon us, and I must frankly say with all respect that I think they were wrong. In *Anderson* v. *Balfour* (1910, 2 Ir. Rep. 497) a gamekeeper, while engaged in the discharge of his duties, was attacked and beaten by poachers, with resulting injuries. It was not disputed that the injuries arose out of and in the course of his employment, but the question was whether there was an "injury by accident" within the meaning of the Act of 1906. The Irish Court decided (*diss.* Cherry, L.J.) in the affirmative. The Lord Chancellor (Sir Samuel Walker) was of opinion that *Fenton's* case gives "an interpretation to accident wide enough to cover even the present case"; and he held the latter to be governed by the principle involved in *Challis* v. *London and South-Western Railway Company*, [1905] 2 K.B. 154. I humbly venture to differ from these views. *Challis'* case was of this nature. A mischievous boy standing on a bridge over a railway dropped a stone upon the engine of a train passing under it, which broke the glass of the engine-driver's cab, with the result that fragments of broken glass were driven into his eye, and he died in consequence of this injury. The case came before the Court of Appeal in England. Lord Collins (then M.R.) said—"It was not contended that there was not an accident. The contention was that this occurrence, though an accident, was not one which could be said to have arisen out of the deceased's employment"; and he held—the other learned Judges agreeing with him—that, looking to common knowledge and experience in regard to the mischievous habits of boys, what occurred was a risk incidental to the employment of engine-drivers; and this, as I read the report, was the ground of the judgment. His Lordship did, however, in commenting upon the findings of the County Court Judge, say (by way apparently of *obiter dictum*)—"I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it." I confess that I have sometimes wondered whether *Challis'* case was rightly decided; and I humbly think that if what then occurred was an accident, that could only have been because the boy's act, though intentional, in so far that he meant to drop the stone upon the engine (I imagine down the funnel), was not intended to injure the driver or anyone else, and therefore the whole matter, from the standpoint alike of the boy and of the injured man, was an accident in the ordinary sense of the word. But in that view it seems to me that *Challis'* case was no true precedent for *Anderson* v. *Balfour*, and forms none for the case now under consideration. Reverting to *Anderson* v. *Balfour*, Holmes, L.J., who agreed with the Lord Chancellor, put the view that, if one substitutes for "by accident arising out of" the words "by something that happened arising out of" (converting a word of Latin derivation into an English equivalent), the gamekeeper's case would clearly come within the description. I cannot think that this is a satisfactory solution of the problem; everything that happens, even unexpectedly, is surely not an accident; and it seems to me that the proposed conversion of the phrases runs counter to the views expressed in the House of Lords as to the proper meaning of the words of the Act under which all these cases arise. Indeed, I observe that Holmes, L.J., agrees "that an assault would not now be called an accident"; but apparently preferred the meaning of the word "as used in our early literature," and as specially defined in the Century Dictionary. I find myself in agreement with Cherry, L.J., who dissented, and whose opinion is based on what was said by the House of Lords as to the meaning to be put on the words "injury by accident," having regard to popular and

ordinary language. In the last case to which I need refer, *Nisbet* v. *Rayne & Burn*, [1910] 2 K.B. 689, the Court of Appeal in England had before them and approved of *Anderson* v. *Balfour*. The facts were that a cashier while travelling in a railway carriage with a large sum of money for the payment of his employer's workmen was robbed and murdered. On an application by his widow for compensation the Court held that the murder was an "accident" from the standpoint of the person murdered and that it arose out of the employment, and compensation was awarded accordingly. I respectively differ from the view that the murder was an accident; and I think the decision cannot stand along with the doctrine laid down by the House of Lords in the cases I have referred to. Cozens-Hardy, M.R., stated his opinion that "it was an accident from the point of view of *Nisbet*," and that "the point was incidentally decided by this Court in *Challis* v. *London and South-Western Railway Company*," and he approved of *Anderson* v. *Balfour*. As already indicated, I do not think *Challis*' case decided this point at all. Farwell, L.J., also proceeded on the authority of these two cases, but concedes that "one would not in ordinary parlance say, for example, that Desdemona died by accident." Kennedy, L.J., agreed with his learned brethren, but he distinguished *Challis*' case upon grounds similar to those I have already submitted, and he proceeded thus—"But whilst the description of death by murderous violence as an "accident" cannot honestly be said to accord with the common understanding of the word, wherein is implied a negation of wilfulness and intention, I conceive it to be my duty rather to stretch the meaning of the word from the narrower to the wider sense of which it is inherently and etymologically capable, that is, 'any unforeseen and untoward event producing personal harm,' than to exclude from the operation of this section a class of injury which it is quite unreasonable to suppose that the Legislature did not intend to include within it." I venture to think that the sentence just quoted illustrates (what appears to me to be the case) that the learned Judges in *Nisbet* v. *Rayne & Burn* failed to give proper weight to the considerations so emphatically enunciated by the Court of last resort, which I endeavoured to summarise at the outset of my opinion. I cannot help thinking that the cases of *Anderson* and of *Nisbet* exemplify a danger similar to that described by Lord Dunedin when he spoke (in *Coe* v. *Fife Coal Company*, 1909 S.C. 393) of a "course of decisions each of which gradually goes a little further than the one which preceded it, until at last you reach a point which, when the first decision was given, was probably not contemplated." For the reasons now stated I consider that the facts of the present case do not amount to one of "personal injury by accident," and if that view is correct there is of course an end of the respondent's claim.

It is unnecessary, therefore, for me to determine the other question—whether, assuming that the injury resulted from accident, it arose out of the respondent's employment. That would, I think, be a difficult question to decide. My present impression is that it did so arise. It seems to me that it would not be easy to distinguish this case upon any valid ground from that, for instance, of a gamekeeper assaulted by poachers in the discharge of his duty, which would, as I think, be clearly an injury (though not an injury by accident) arising out of the employment. In both cases it may be said that the man was hurt purely and solely because of his employment, and that the fact of employment was the direct cause of the injury which originated from the dislike entertained (in the one case) by strikers towards "blacklegs," and (in the other) by poachers towards gamekeepers. I think this view would have been almost irresistible if the present respondent had been injured on his way from the railway station to the woodyard by mud (or even a stone) thrown at him by one of the strikers; and I am not clear that the result should be different because the respondent and his companions had reached a place of supposed safety and were only attacked and injured by their ill-wishers after the latter had invaded the yard in spite of the efforts of the police. But the question is attended with difficulty, which the numerous decisions referred to at the discussion do not tend to lessen, and I have not formed and do not wish to express a final or decided opinion upon it.

In my view we ought to answer the first branch of the question put to us in the negative, and to find that it is unnecessary to answer the other branches of it.

LORD SALVESEN—This case raises a question of very general importance, and if rightly decided by the arbitrator involves an extension of the Workmen's Compensation Act to cases which have hitherto in Scotland been regarded as entirely beyond its scope. The arbitrator in reaching his decision has apparently followed the line of least resistance, adopting the path which had so far been prepared for him by the two decisions to which he refers. These decisions are to the effect that an injury occasioned to a workman in the course of his employment by the wrongful or even criminal act of a third party may be an accident from the point of view of the injured man within the meaning of the Act and will entitle him to compensation from his employer if the so-called accident arose out of his employment. This is a doctrine which may have far-reaching consequences, and the grounds of which require therefore to be carefully considered.

The first question put in the case is whether the injury sustained by the respondent was "injury by accident." If the cases of *Anderson* v. *Balfour* and *Nisbet* v. *Rayne* were rightly decided this question falls to be answered in the affirmative. In the former a gamekeeper was injured as the result of an assault by a

poacher; in the latter a workman who was guarding his master's property was murdered by a robber. In the present case the respondent, along with a number of other imported labourers in the defenders' employment, was assaulted by a body of strikers whose places they had taken, and six of whom were afterwards tried before the High Court of Justiciary at Edinburgh, and after conviction were sentenced to a term of imprisonment for mobbing and rioting. On the facts, therefore, the case is indistinguishable on the point now under consideration from the cases relied on by the arbitrator.

In my opinion the two cases in question were ill decided; and as they have not received the approval of the House of Lords we are not bound to follow them. In the Irish case Cherry, L.J., dissented; and in the case of *Nisbet*, Kennedy, L.J., while agreeing with the other members of the Court, adduced reasons which I think ought to have led him to an opposite conclusion. In the Irish case the reasoning of the majority was something to the same effect. One of the judges defined "accident" as some thing that happens, and justified this definition by a reference to the meaning of the word in earlier English literature.

These views are, I think, entirely opposed to the authoritative definition formulated by Lord Macnaghten in the case of *Fenton*, (1903) A. C. 443, which has been quoted by your Lordship in the chair. Now the opinions to which I have referred seem to me to violate this definition in two respects. In the first place, they attribute to the word "accident" a meaning which is not "the popular and ordinary meaning"; and in the second place they have overlooked entirely that an untoward event which is designed is expressly excluded from the definition. It is vain to say that an injury which a man suffers from a criminal assault is not designed so far as he is concerned, for I can scarcely believe that Lord Macnaghten would have used that language with regard to an injury which a workman intentionally inflicted on himself. Such a case would not require to be provided for in the definition of the word "accident," because no rational person could imagine that such a injury could be regarded as an "injury by accident." Lord Macnaghten's definition has since been approved of in the case of *Clover* v, *Hughes*, [1910] A.C. 242, and was treated by the Lord Chancellor as conclusive in the case then before the House. Unless, therefore, we are to extend the definition, as Kennedy, L.J., felt constrained to do, by interpreting the word "accident," not in its popular or ordinary sense, but by reference to an archaic use and as including what in common parlance it necessarily includes, I am unable to hold that this injury which the respondent suffered is one for which his employers are liable to compensate him.

Further, the whole trend of decision both in England and Scotland appears to me to be opposed to the two decisions which I am now considering. In the case of *Falconer*, 3 F. 564, a workman who was injured in consequence of two of his fellow-workmen engaging in horseplay and one of them unintentionally knocking him over, was held not to be entitled to compensation. The ground of decision was no doubt that the accident did not arise out of the employment, and has therefore more bearing on the second question in this case. This decision was followed in the case of *Armitage*, [1900[2 K.B. 178. In that case two boys engaged in the works had quarrelled, and one of them becoming angry picked up a piece of iron and threw it at the other. It missed him, but hit a third workman in the eye. Compensation was claimed in respect of this injury, but it was unanimously held by the Court of Appeal that where an accident happened to a workman through the tortious act of a fellow-workman which had no relation whatever to their employment, that it did not arise out of the employment within the meaning of the Act. Here again it was assumed for the purposes of the decision that the injury had been caused by accident, and in the popular sense it perhaps had; but it seems difficult to understand that if a workman has to take the risk of the tortious acts of his fellow-workman he should not much more be held to be excluded from compensation in respect of the tortious acts of third parties who had forced an entrance into his employers' works. In the case of *M'Intyre* v. *Rodger & Company*, 6 F. 176, Lord Young, who certainly cannot be accused of construing the Act in too narrow or technical a sense, made the following remarks —"I can quite imagine a case in which death or bodily injury might occur to a workman engaged at work and within premises dealt with by the Act and yet where the master would not incur liability. Suppose a person having ill-will to the workman and intending to murder him, came into the premises and killed or injured him while engaged in his work, I think that that is a case which does not fall within the scope, meaning, intention, or good sense of the statute; and that the statute was not meant to make an employer liable for death or bodily injuries so occasioned." These observations appear to me precisely to meet the case here, and it is immaterial that the injured man had incurred the ill-will of the person who assaulted him because he had supplanted him in his employment. The appellants here were not guilty of any unlawful act in engaging the respondent and his companions to take the places of the men who were on strike, and they were quite entitled to assume that their persons would be protected by the police from violence.

The case of *Fitzgerald*, [1908] 2 K.B. 796, was decided after the case of *Fenton*, and was cited as an authority in favour of the appellants, but the Court there unanimously reaffirmed the proposition that an employer is not liable under the Workmen's Compensation Act to pay compensation for injury caused to a workman while engaged at his work by the tortious act of a fellow-workman which had no relation to his employment.

All these cases were argued on the footing that the risks incidental to a workman's employment include not merely the negligence of fellow-workmen, but such horseplay or misconduct as occasionally occur in the best regulated works; and that the employer who has brought men together so as to expose them to the risk of injury at each other's hands may fairly be taken to assume such risks as well as acts of negligence in performing his work. In none of them was it ever suggested that if a workman was injured by the deliberate act of his fellow, such an injury would entitle the sufferer to compensation except from the party from whom he received it. But if this is an unwarrantable assumption in the case of an injury sustained at the hands of a fellow-workman, much more does it appear to me to apply to the case of a workman who is injured by a third party over whom the employer has no control and who has entered his premises without his consent.

The next question is, Did the accident arise out of the respondent's employment with the appellants? and I have already cited the cases which appear to me clearly to show that it did not. In *Fitzgerald's* case Kennedy, L.J., said—"I do not know that one could give a better explanation when seeking to give the right meaning to the words 'out of' than is given at page 183 of that case (*Armitage* v. *Lancashire and Yorkshire Railway Company*, [1902] 2 K.B. 178), namely, that the words appear to point to accidents arising from such causes as the negligence of fellow-workmen in the course of the employment, or some natural cause incidental to the character of a business. If I were to venture to add anything that somebody might not carp at the expression 'natural,' having regard to the case of *Challis* v. *London and South-Western Railway Company*, it would be to add to the word 'natural' or 'common'"; and Buckley, L.J., says—"The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." I quite agree with these opinions, but when I apply them to the present case they seem to me to exclude the idea that the respondent's injury arose out of the employment. It was certainly not the result of a natural or common cause incidental to the character of the business, although perhaps it may be said that it was not altogether unlikely to occur to a body of workmen who were engaged to take the place of men on strike, who do not always confine themselves to the arts of peaceful persuasion. The employment of the respondent here was to work in a woodyard, and I confess that I cannot see how it is incidental to that employment that he should be assaulted by a body of rioters. In this respect the case appears to me to be quite distinguishable from the cases of *Nisbet* and *Anderson*. The injuries which were held to entitle the workmen to compensation there were received by them when in defence of their master's property and in the performance of their duties towards him. That was not so in the present case. The respondent was the victim of ill-will occasioned by his having accepted unpopular employment, but when injured he was not in any way defending his master's property, nor had he been engaged for that purpose. I would only add that the case of *Challis* seems to me to afford no support to the later decisions, because it proceeded on the assumption that mischievous boys are to be treated as more or less irresponsible, and that a person whose duty ordinarily exposes him to risks from such mischief is very much in the same position as a man who is exposed to injury from animals in the course of his employment. For these reasons I am of opinion that we should answer the first and second questions in the negative. The answer to the third question is in that view quite immaterial, but it was not contended that the respondent did not meet with his injury in the course of his employment.

The Court answered the first question in the negative and found it unnecessary to answer the other two questions.

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

Counsel for Respondent — Watt, K.C.— T. G. Robertson. Agent — D. Maclean, Solicitor.

HIGH COURT OF JUSTICIARY.

Tuesday, July 4.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Johnston, and Lord Salvesen.)

M'VEY *v.* H.M. ADVOCATE.

Justiciary Cases—Procedure—Competency —Indictment—Irregularities in Commitment—Omission of Crave for Warrant to Bring Accused up for Examination.

A person charged with assault was arrested on a warrant obtained from the Sheriff on a petition for authority to apprehend and detain him for examination. The accused was brought before the Sheriff, and intimated that he did not desire to emit a declaration. Thereafter he was served with an indictment, which however was not proceeded with. Subsequently another application by minute was made for a warrant for apprehension and imprisonment of the accused on the same charge, but without craving warrant to detain him for examination. This was granted by the Sheriff, and the accused was again arrested, committed to prison, served with another indictment, and eventually tried and convicted.