granted; but following the example of Lord Moncreiff in the case of *Carruthers' Trustee* v. *Finlay & Wilson*, 1897, 24 R. 363, I do not express any opinion as to the competency of the application. Seeing that the pursuers have been allowed to sue this action on behalf of themselves and the other creditors, I am not prepared to say that the consigned money has not been recovered on behalf of the minuter's clients. Further, if the circumstances had been different the claim of the minuter for a charging order might, in the words of Lord Young (24 R. 367) have been "irresistible." It would be strange if the general creditors of the firm who had incurred neither expense nor trouble nor responsibility in connection with the litigation, were allowed to take a gratuitous benefit from the success of the action, while the pursuers, or alternatively the minuter, were left in the position of losers to the extent of their extra-judicial expenses. In the present case, however, the total amount of the claims of the creditors other than the pursuers and the defender are so small that they may be disregarded, and the practical effect of granting the motion would be to compel the defender to pay the pursuers' extra-judicial expenses over and above the judicial expenses already paid. It cannot be suggested that the defender took any benefit from the litigation, nor in my opinion is there any equity requiring him to contribute to the expense of recovering the consigned fund. I accordingly refuse the motion, and find the minuter liable to the defender in £2, 2s. of expenses.

The Lord Ordinary refused the crave of the minute.

Counsel for the Minuter—Morison, K.C. —Lippe. Agent—W. Croft Gray, S.S.C.

Counsel for the Defender—M'Lennan, K.C.—Mercer. Agent—D. M'Lean, Solicitor.

Wednesday, November 1.

FIRST DIVISION.

[Sheriff Court at Dundee.

REFUGE ASSURANCE COMPANY, LIMITED *v.* MILLAR.

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

An insurance agent, whose duties consisted in going from door to door collecting premiums, while in the course of his employment fell down a stair and sustained severe injuries. *Held* that the accident arose out of his employment in the sense of the Workmen's Compensation Act 1906.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 2 (1)—*Notice of Accident—Want of Notice—*"*Reasonable Cause.*"

On 9th May 1910 an insurance agent, while employed in collecting premiums, fell down a stair and sustained injuries to his left side, shoulder, and arm. He gave no formal notice, as he thought his injuries were of a temporary character, but a day or two after the accident, and again on 8th June 1910, he gave verbal notice of the accident to his employers' manager, and on 29th June 1910 he left his situation. His injuries having subsequently become worse, and resulted in his complete incapacity for work, his agent, on 12th September 1910, gave formal notice of the accident. *Held* that the delay in giving notice was due to a "reasonable cause" within the meaning of section 2 (1) of the Workmen's Compensation Act 1906, and was not a bar to proceedings under the Act.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Process—Appeal—Accident Arising out of and in Course of Employment—Failure of Arbitrator to State Facts on which his Finding was Based—Transmission of Process to Court of Session.*

Circumstances in which the Court, on the failure of an arbitrator, after a remit made to him to state the facts on which his finding was based, ordered the process to be transmitted to the Court of Session, and after a rehearing on the stated case, the arbitrator's report, and the process, *refused* to interfere with the arbitrator's finding on the facts.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), enacts—Section 1 (1)—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall be liable to pay compensation." Section 2 (1)—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, . . . and unless the claim for compensation . . . has been made within six months from the occurrence of the accident causing the injury . . . Provided always that (*a*) the want . . . of such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want . . . or that such want . . . was occasioned by mistake . . . or other reasonable cause; and (*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake . . . or other reasonable cause."

James Millar, assurance agent, Birkhill, Dundee, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Refuge

Assurance Company, Limited, Manchester, which carried on and had a place of business at 45 Commercial Street, Dundee, the matter was referred to the arbitration of the Sheriff-Substitute at Dundee (CAMPBELL SMITH), who found the pursuer entitled to compensation, and at the request of the appellants stated a case for appeal.

The following *facts* were found proved:—"That the respondent James Millar, who is sixty-five years of age, entered the service of the appellants, The Refuge Assurance Company, Limited, in December 1899; that his work with the appellants consisted in his going from door to door collecting premiums of assurance on their behalf; that on 9th May 1910, while engaged in the course of his employment with the appellants, and engaged collecting assurance premiums on behalf of appellants, the respondent fell down a stair at 134 Blackness Road, Dundee, thereby sustaining injuries to his left side, shoulder, and arm; that a day or two after the occurrence of the accident, and again on 8th June 1910, the respondent gave verbal notice of the accident he had sustained to appellants' manager in Dundee, and having on the last-mentioned date asked for a week's rest, was informed that he had better resign; that respondent on 15th June 1910 handed in his resignation, dated 8th June 1910, and left appellants' employment on 29th June 1910; that on that date he applied for a situation with another insurance company, but did not receive employment from them; that from 29th June 1910 he became worse and remained at home. Respondent stated that he was 'trying to fight it off, but for six weeks he got no sleep as the pain was so dreadful'; that the pains which he had felt since the date of the accident became so acute that on 6th September 1910 the respondent consulted Dr Crichton, and that on 12th September 1910 the respondent's agent gave the appellants formal notice of the accident; that the want of notice was occasioned by mistake (viz., a mistaken belief that his injuries were of a temporary nature, and were not such as to cause him to ask compensation) within the meaning of section 2 (*a*) of the Workmen's Compensation Act 1906; that the accident to respondent on 9th May 1910 arose out of and in the course of his employment with the appellants, and that as a result of the injuries then sustained by the respondent the left side of his face has been paralysed, and he suffers from severe pain in the left side of the body, and has been totally incapacitated for work since 29th June 1910; that the average weekly earnings of the respondent were £1, 9s. 4d.; and that the appellants were liable to respondent in compensation at the rate of 10s. per week, commencing as from 29th June 1910; and awarded accordingly."

The *questions of law* were—"1. Whether the respondent, alleging accident on 9th May 1910, and incapacity for work as from 29th June 1910, and not having given statutory notice of the accident until 12th September 1910, is barred from claiming compensation? 2. Whether the respondent, having voluntarily left the appellants' employment on 29th June 1910 without having given notice of accident as required by section 2 of the Workmen's Compensation Act 1906, is barred from claiming compensation? 3. Whether there was evidence upon which it could be competently found that the said James Millar sustained an accident arising out of and in the course of his employment on 9th May 1910? 4. Whether there was evidence upon which it could be competently found that verbal notice was on 8th June 1910, or prior thereto, given by respondent to appellants' manager in Dundee, and whether such notice was sufficient legal notice? 5. Whether there was evidence that the paralysis from which the said James Millar is suffering was a result of the alleged accident, within the meaning of the Workmen's Compensation Act 1906? 6. Whether the appellants, having suffered prejudice by the delay in giving statutory notice, the respondent is barred from claiming compensation?"

The case was heard by the First Division on 9th March 1911, and the Court thereafter remitted the case back to the Sheriff-Substitute to state the facts proved before him on which he found that the respondent sustained an accident arising out of and in the course of his employment on 9th May 1910.

The Sheriff-Substitute reported as follows:—"The Sheriff-Substitute, as arbitrator, found it proved on the evidence of the respondent and the witnesses Mrs Isabella Lindsay or Hutton and Mrs Kennedy, who resided at 134 Blackness Road, Dundee, that the respondent was in the stair there on 9th May 1910 for the purpose of collecting premiums of assurance due to the apnellants by the witness Mrs Kennedy: Found it proved that the respondent fell—that fact never having been denied, the allegation regarding the fall in defence being that sufficient legal notice of it had not been given to the defenders—and sustained injury on the said stair on the occasion above set forth, and that from the following facts which I found proved—(1) on the evidence of the respondent and that of wife, that on going home from said stair he at once told his wife of the accident, and where and how it had happened; that she at once applied external remedies to the injured parts; that prior to that day respondent had never been indisposed in any way, but had been a strong healthy man; that respondent ceased to work on account of said accident; that his wife continued to treat respondent's injuries until Dr Crichton, the family doctor, was called in in the beginning of September 1910; (2) on respondent's own evidence and that of the appellant's district manager (Mr Isaac Jones), the respondent informed the district manager within two days after the occurrence of the accident that he had been injured as stated; (3) on the medical evidence of Dr Don and Dr Crichton that the respondent's physical condition was such

as was likely to be caused by the fall of which he complained, and was in their opinion due to it."

The case was again heard on 8th June 1911, and the appellant moved the Court to ordain the process to be transmitted to the Court of Session in respect that the report of the Sheriff-Substitute had failed to answer the remit made to him. The appellant cited the case of *Dundee Steam Trawling Company, Limited* v. *Robb*, October 21, 1910, 48 S.L.R. 11. The respondents did not oppose the motion.

The Court thereafter pronounced the following interlocutor:—"The Lords having resumed consideration of the stated case on appeal along with the report by the Sheriff-Substitute, ordain the Sheriff-Clerk at Dundee to transmit the process in the arbitration to the Clerk of the First Division of the Court of Session."

Argued for the appellants—The *onus* was on the claimant to show that the accident arose "out of" as well as "in the course of" the employment, and this *onus* had not been discharged—*Pomfret* v. *Lancashire and Yorkshire Railway*, [1903] 2 K.B. 718. There was no evidence to show that the paralysis was due to the accident, or that the man was doing his duty at the time of the accident. [The LORD PRESIDENT referred to the case of *Kitchenham* v. *Owners of s.s. Johannesburg*, [1911] 1 K.B. 523, and [1911] A.C. 417.] The present case was distinguishable from that case, because a sailor was presumably always on duty. Further, sufficient notice of the accident had not been given, and no sufficient reason had been given for the delay—*Rankine* v. *Alloa Coal Company, Limited*, February 16, 1904, 6 F. 375, 41 S.L.R. 306; *Brown* v. *Lochgelly Iron and Steel Company, Limited*, 1907 S.C. 198, 44 S.L.R. 180. The *onus* was on the respondent to show that the appellants had not been prejudiced—*Hughes* v. *The Coed Talon Colliery Company, Limited*, [1909] 1 K.B. 957, *per* Fletcher Moulton, L.J., at p. 962.

Argued for the respondent—The accident in the present case arose "out of" as well as "in course of" the employment. While the risk of falling on a stair was a general risk, yet in the case of an insurance collector whose duties obliged him to climb stairs continually, there was a material increase of the risk of falling, and that took it out of the class of an accident that might happen to anyone, and made it an accident arising out of the employment—*M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15; *Kitchenham* v. *Owners of the s.s. Johannesburg, cit. sup.* The notice given here was sufficient. [The following authority was also referred to from the Bench:—*M'Donald* v. *Owners of S.S. Banana*, [1908] 2 K.B. 926.]

At advising—

LORD PRESIDENT—In this case, after some very unsatisfactory procedure, as to which, under the circumstances, I need make no further allusion, your Lordships are in possession of the whole facts in the case, and what may be called the main question was, undoubtedly, whether there was any evidence to show that the claimant met with an accident "in the course of and arising out of" his employment.

According to his own story, he was a collector for the assurance company which he sues—that is to say, his business was to go round and collect premiums from the various persons who were assured for small sums in this assurance company, and while he was doing his business and going up a certain stair to get a premium from a lodger who, he thought, lodged at the top of it (as a matter of fact the lodger in question had removed), he fell upon the stair and hurt himself. At the time he did not think the injury so serious, but afterwards it developed and, we are told, caused hemiplegia, which incapacitated him for further work.

I do not hesitate to say that this case has given me great difficulty. As far as the law of the matter is concerned, it is one of those cases where in one sense there is no difficulty in stating the law. The difficulty is in the application of it. I do not think I need say more about it, because there has been a very recent case in the House of Lords, the case of *Kitchenham*, where their Lordships approved in terms of the judgment of the Court of Appeal, and the judgment of the Court of Appeal is given in the twin cases of *Kitchenham* and *Leitch*, which are reported on the same page in [1911] 1 K.B. 523, and which, read together, afford a good contrast and a very good example of the criteria upon which such cases should be decided. And the judgment there which had the special approbation of the House of Lords was the judgment of Fletcher Moulton, L.J.

The distinction that is there drawn is between accidents which happen to a man, and are, so to speak, brought upon him by his business, and accidents which, although a man may be in one sense upon his business, are just accidents which may happen to everybody. Now the distinction even between those two classes comes to be very fine, and it would be quite impossible to frame any definition or set of rules which *ab ante* would embrace all the cases, and, in particular, there would be an obvious difference according to the class of employment which a man is in. Take the case, for instance, of a street accident. Everyone has to go into the street, and if a man's business does not actually take him to the street, well, then, although the accident may arise in the course of his employment, it scarcely arises out of his employment. But, on the other hand, there may be an accident to a person whose business actually takes him to the street. For instance, I cannot doubt that if a sandwichman — whose actual business is to wander up and down the streets all day—if a sandwichman in the course of his wanderings was run over by a taxi-cab, I cannot doubt that that would be an accident arising not only in the course of but also out of his employment.

Well, now, when you come to the appli-

cation here, I come to the conclusion that if this man was on this stair simply and solely for the purpose of his business, namely, to go to the person whom he was calling upon, this accident fairly arose out of his employment as well as in the course of it.

But there remains the question whether he did meet with his accident on the stair, as he says, and that is the part of the case that has given me personally most trouble, because I must be fair in stating that if I had been the arbiter I should have come to the conclusion that there was not enough evidence to show that he had been there. But, then, that is not exactly the criterion which I am entitled to apply here. I think that it is well settled that all these questions which depend, so to speak, on pure fact—I do not mean that there are no other considerations as well, but where pure fact underlies them—the duty of this Court is not to reverse the arbiter unless his judgment, so to speak, cannot be supported. Therefore I say that although I should have come to another conclusion myself, I cannot hold that there was no evidence on which the arbiter might go; and therefore I do not feel myself entitled to interfere with his judgment.

There were two subordinate questions in the case which I do not think give any trouble as regards the giving of notice. It seems to me here that there was a reasonable excuse, because I think it was quite probable that the claimant was not aware of the seriousness of his accident, and that, when he did come to know of the seriousness of the accident he did give notice.

Upon the whole matter, therefore, although, I confess, not without doubt and hesitation, I think the judgment the Sheriff-Substitute has given cannot be said to be unsupportable, and that your Lordships should dismiss the appeal. I do not think it necessary to answer all the questions as they are put in the stated case.

LORD KINNEAR—I am of the same opinion. Upon the preliminary question as to whether the statutory provisions have been complied with or not, I should not think of disturbing the Sheriff-Substitute's judgment except upon much stronger grounds than I find in this case, because the question whether there has been a reasonable excuse for delay is really a question of fact upon which I do not think we should interfere if there was evidence before the Sheriff on which he could reasonably have reached his conclusion; and in the present case it is impossible to say that there was no such evidence.

Then upon the question whether the accident arose out of and in the course of the employment, I agree with your Lordship that there is difficulty upon the facts. But I cannot say that there was no evidence before the Sheriff-Substitute upon which he might reasonably find the facts as he did, and I therefore take his findings of fact as conclusive. But then it is a mixed question of fact and law whether the accident—supposing it to have happened as the Sheriff-Substitute holds it did—is one that arose out of the workman's employment. As to that the case of *Kitchenham* is of course of paramount authority; but the line of division between the two classes of case—those which fall within the rule of *Kitchenham* and those which are outside it—is a fine one, and in this case I think there is some difficulty in applying the rule.

The general rule, as stated by the Lord Chancellor, is that if an accident arises from a risk that is common to everyone and not specially connected with the work and employment of the persons claiming compensation, then it cannot be said to have arisen out of his employment in the sense of the Act. And accordingly it is said that this tripping upon a stair is a thing which might happen to everybody who goes up and down the stair, and therefore is a risk which is not specially connected with the particular work of the respondent. I think there is force in that; but then, on the other hand, I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time. I think Lord Justice Fletcher Moulton's illustrations of two kinds of cases in the opinion to which your Lordship has referred, bring that distinction out clearly enough. The learned Judge's opinion deals with two different cases which were decided at the same time. In each of these cases a sailor had been on shore with leave, and while returning to his ship fell into the water and was drowned. In one, that of *Leach*, he had reached a gangway which was the means of access to his ship and fell from that gangway into the water, and it was held that the accident arose out of the employment. In the other—*Kitchenham*—the man was shown to have been crossing the wharf, but it was not shown that he had reached the gangway; and if the accident was due to a slip on the wharf when the man might have been engaged in some purpose of his own, it was said that it was not caused by a danger incidental to his employment, because it was not proved that he was in the fulfilment of his employment when the accident happened.

Then the learned Judge pointed out that it is not the duty of the Court to speculate as to these matters, but that the applicant must prove his case.

But in the present case the accident was due to the means of access to a place where the man was bound to go in fulfilment of his employment.

I have come to the conclusion, although not without difficulty, that we ought not to disturb the Sheriff-Substitute's judgment, because there was evidence on which he might reasonably hold that the man was hurt in consequence of a risk specially

connected with his employment, because he was required by his employment to make use of a stair.

LORD MACKENZIE—I agree with your Lordship, though I have great doubt in coming to the conclusion that there was sufficient evidence in the case to warrant the Sheriff-Substitute in holding that the accident happened as alleged.

LORD JOHNSTON was absent.

The Court pronounced this judgment—

"Find that there was evidence upon which the Sheriff-Substitute as arbitrator was entitled to find for the claimant: Find it unnecessary further to answer the questions of law as stated in the case: Affirm the said arbitrator's determination: Dismiss the appeal, and remit the cause to the arbitrator to proceed as accords," &c.

Counsel for the Appellants—Cooper, K.C. —Low Mitchell. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondent—G. Watt, K.C.—Mercer. Agent—R. S. Carmichael, S.S.C.

Friday, November 3.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

LORD BROOKE AND OTHERS *v.* MARCHIONESS OF HUNTLY.

Sheriff—Process—Failure to Lodge Defences — Decree by Default — Sheriff Courts (Scotland) Act 1907 (7 *Edw.* VII, *c.* 51), *First Schedule, Rule* 43.

Rule 43 of the first schedule of the Sheriff Courts (Scotland) Act 1907 enacts—"Within six days of the condescendence being lodged the defender shall lodge his defences."

A defender, acting in accordance with a practice which obtained in the local Sheriff Court, delayed lodging defences until after the six days had expired The Sheriff-Substitute, and on appeal the Sheriff, granted decree on the ground of failure to lodge defences, and no sufficient cause being assigned for the delay. The Court *refused* to interfere.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51) provides—first schedule—Rule 34—"Where appearance has been entered the sheriff-clerk shall enrol the cause for tabling on the first court-day occurring after the expiry of the induciæ." Rule 42—"In all defended causes the pursuer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence. . . ." Rule 43 [*v. supra in rubric*], and Rule 56—"In a defended action . . . when any . . . pleading has not been lodged within the time required by statute . . . the Sheriff may grant decree as craved . . . with expenses, but the Sheriff may upon cause shown prorogate the time for lodging any . . . pleading . . ."

Major the Honourable Leopold Guy Francis Maynard Greville, commonly called Lord Brooke, Member of the Royal Victorian Order, and others, trustees under a declaration of trust executed on 5th, 9th, 10th, and 12th November 1908 by them, brought an action in the Sheriff Court at Aberdeen against the Most Honourable Charles Gordon, Marquess of Huntly, and the Most Honourable Amy, Marchioness of Huntly, his wife, and the said Marquess as her husband and her curator and administrator-in-law. In the initial writ the pursuers claimed delivery of the household furniture and other effects specified in an inventory therein described, and they craved the Court to decern and ordain the defenders to deliver to the pursuers within seven days, or such other period as the Court might order, the household furniture and other effects specified in the said inventory.

The following *narrative* is taken from the opinion of the Lord President—"This is an appeal from an interlocutor of the Sheriff of Aberdeen affirming an interlocutor of the Sheriff-Substitute. The action was raised in the Sheriff Court of Aberdeen, and sought decree ordaining the defenders to deliver certain furniture, the property of the pursuers; and in case that order should not be obtempered, the pursuers asked that warrant should be granted to certain persons authorised by the Court to remove the furniture in question. The action was begun by initial writ, and on 14th July the ordinary warrant of citation was granted, upon an induciæ of seven days. On the 20th one of the defenders entered appearance, and on the 26th the case was tabled, which is in accordance with the 34th section of the rules of the Sheriff Courts (Scotland) Act 1907. Now section 42 of the rules provides that 'the pursuer shall at the tabling of the cause, or within three days thereafter, lodge a condescendence.' In this case that was done at the tabling of the case. The next section, 43, is in these terms—"Within six days of the condescendence being lodged the defender shall lodge his defences." Accordingly here the defences became due on 1st August. No defences were lodged on that day. The pursuers, and the defenders' agents then got into communication, and it became apparent that there was a little difference of opinion between them, the pursuers' agent thinking there was no reason why the case should not be taken up on 9th August, the first court-day in vacation, and the defenders' agent objecting to that course on the ground that the Sheriff-Substitute to whom the cause had been apportioned would not be sitting on that day. After conferring about the matter, however, the pursuers' agent consented to withdraw the enrolment for 9th August provided the defenders' agent let him have the defences by 14th August at latest. That undertaking was afterwards taken back by the pursuers' agent upon receipt of