result, I feel that the facts in this case are too strong to be got over; and if one comes to the conclusion, as I do, that the domicile of origin of the husband in this case, the bankrupt, was English, then nothing which he did afterwards could by any possibility be considered as divesting him of his domicile of origin. Therefore the conclusion at which the Lord Ordinary has arrived is right. It is not necessary, putting my judgment upon that ground, to go into the other matters which were dealt with by the Lord Ordinary.

LORD SKERRINGTON—I agree with your Lordships. I think the case a peculiarly hard one for the defender, because I do not think that her advisers could have given her any other advice than that she should institute her action of divorce in the Scottish Courts. But when we review the very full proof which has been taken in this action of reduction, I concur with your Lordships in thinking that the permanent home of the bankrupt's father in 1871 was in England and not in Scotland; and in my view of the law that is enough to change his domicile from Scotland, where he was originally domiciled, to England.

I regret very much that the law should be so, because I think it is most unfortunate that a person's civil status should be allowed to remain in a state of uncertainty and dependent upon a judicial inquiry into a number of minute facts. I should have been glad, if I had seen my way to do so, to have adopted what I think was the view of certain eminent lawyers to the effect that a domicile of origin cannot be lost unless the person has knowingly and deliberately abandoned it in the sense that he has intentionally changed his civil status from that of a Scotsman, to that of an Englishman or of a foreigner as the case may be. In that view it would be practically impossible ever to prove a change of domicile, and I think that this law would be highly beneficial. The authorities as a whole are against this view, and accordingly I am constrained to concur with your Lordships.

The Court adhered.

Counsel for Pursuer—M'Lennan, K.C.—Dallas. Agents—Forbes, Dallas, & Co., W.S.

Counsel for Defender—Murray, K.C.—Howden. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, March 13.

EXTRA DIVISION.

[Sheriff Court at Banff.

M'WILLIAM *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising Out of and in the Course of the Employment—Prohibited Act.*

A railway porter had as part of his duties to be in attendance upon the platform to transfer luggage to and from passenger trains running on main and local lines. A train stopped at its usual place, twenty yards from where he was standing. As the van passed he tried to jump on, so as to be ready to remove luggage as quickly as possible; he fell and was injured. Jumping on trains by porters was strictly prohibited. He had been given the company's book of rules, but had not read it; he had also been checked and warned against the practice. *Held* that the accident arose out of and in the course of the employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between William M'William, sometime railway porter, Portsoy, *appellant*, and the Great North of Scotland Railway Company, *respondents*, the Sheriff-Substitute (DUDLEY STUART) refused compensation and stated a Case for appeal.

The Case stated—"The appellant, who is twenty years of age, entered the respondents' service as a railway porter at Tillynaught Station on 3rd April 1913. On 26th April he met with the accident for which he claims compensation. It was part of his duties to be in attendance upon the platform on the arrival of passenger trains and to transfer luggage and parcels to and from the trains running on the main line and the local line to Banff. On the day in question the appellant was on the platform, opposite the door of the booking office, awaiting the arrival of the 10·55 a.m. passenger train from Elgin, which arrived at Tillynaught Station one minute after scheduled time, namely, 12·15 p.m., in order to be ready to remove luggage and parcels from the van of that train. The point at which the van of said train usually stops and at which it stopped on this occasion was about twenty yards farther up the platform than the point where the appellant was standing. As the van of the train passed the appellant, which it did at a considerable rate of speed, he ran after it, and overtaking it as its speed decreased, jumped or tried to jump upon the footboard of the luggage van, which was the last vehicle but one of the train, in order to be ready to remove the luggage as quickly as possible when the train stopped. He succeeded in taking hold of the handle at the end of the van, but did not succeed in getting a foothold with both feet upon the footboard. He appears to

have partly swung round the corner of the luggage van and slipped off the footboard on to the line, and his right foot and ankle were severely injured by the wheels of the meat van, which was the last vehicle of the train. He was removed to the hospital at Banff, and it was found necessary to amputate his leg between the knee and ankle. As the result of the accident the appellant sustained serious and permanent disablement, and has been wholly incapacitated from work down to the date of the present action. The stump of his leg is now healed.

"When the appellant entered upon his duties on 3rd April the stationmaster, according to the usual practice, gave him a book of the rules and regulations, defining, *inter alia*, the scope of the duties of servants dealing with trains at stations, to be observed by the respondents' servants, and the appellant signed the document to the following effect:—'I, William M'William, having this day been furnished with a copy of the Book of Rules and Regulations of the Great North of Scotland Railway Company, and Appendix to Working Time Table, which came into operation on 1st August 1908, hereby undertake to observe and obey the same and all other rules, regulations, and instructions that may from time to time be issued for the working and management of the Company's railways, so long as I remain in the Company's service. (Signed) Wm. M'William, porter, Tillynaught Station, 3rd April 1913. Witness (Sgd.) Jas. Dawson.' Rule 23 (*c*) of the General Rules and Regulations is in these terms—'No servant must jump on to the steps or footboards, or run alongside of trains entering stations.'

"The appellant deponed that he had not read the rules, and I accepted his statement. The stationmaster did not, in handing him the book, direct his attention to rule 23 (*c*), or to any particular rule. He merely told him to read the rules. During the time the appellant was in the respondents' service the stationmaster observed him disobeying rule 23 (*c*) by jumping upon the steps of an incoming train, on more than one occasion, and on each occasion the stationmaster checked him for doing so. He was also on one occasion warned by one of his fellow-servants who saw him doing so that it was a dangerous practice.

"It was proved that it is generally understood in the railway service that the prohibition as expressly stated in rule 23 (*c*) refers only to the case of trains which are entering a station. In the case of outgoing trains, and in shunting operations, it is a common practice for guards and porters to board trains in motion, and the rule referred to does not forbid this. While this distinction is generally understood by railway servants, it was not proved that the appellant knew of it. It was not proved that the respondents or their officials permit the practice of jumping upon trains entering stations without objection. On the contrary, I found it proved that this practice is as far as possible checked by those responsible for enforcing the rules; and in the appellant's case, as already mentioned, he was warned upon more than one occasion."

The Sheriff-Substitute further stated—"Upon these facts I found that the accident which caused the appellant's injuries, while it arose in the course of, did not arise out of his employment, in respect that the appellant's act was (1) unnecessary, (2) obviously dangerous, and (3) not expected or required of appellant but expressly forbidden. I therefore refused compensation."

The *question of law* for the opinion of the Court is—"Whether there was evidence upon which it could competently be found that the appellant's injuries were not the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellant — What the workman did was clearly part of his ordinary work. The mere breach of a rule did not debar a workman from compensation—*Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632. The workman was doing his work, though in the wrong way, but that did not disentitle him—*Burns* v. *Summerlee Iron Company*, 1913 S.C. 227, 50 S.L.R. 164; *M'Diarmid* v. *Ogilvy Brothers*, 1913 S.C. 1103, 50 S.L.R. 883; *Mawdsley* v. *West Leigh Colliery Company, Limited*, 1911, 5 B.C.C. 80. In order to disentitle him the workman must do something of a different kind from what he was employed to do—*Barnes* v. *Nunnery Colliery Company, Limited*, [1912] A.C. 44; *Richard Evans & Company, Limited* v. *Astley*, [1911] A.C. 674. *Reed* v. *Great Western Railway Company*, [1909] A.C. 31; *Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q.B. 141, were cases in which the workman did something for his own pleasure and was therefore held to be disentitled to compensation. On the other hand, serious and wilful misconduct did not disentitle him—*Fraser* v. *John Riddell & Company*, 1913, 2 S.L.T. 377, 51 S.L.R. 110. Where it had been held that an accident did not arise out of the employment, the cases were in one of two categories—either (1) the workman was not doing his own work—*Burns* (*cit.*); *M'Daid* v. *Steel*, 1911 S.C. 859, 48 S.L.R. 765; *Kerr* v. *William Baird & Company, Limited*, 1913 S.C. 662, 50 S.L.R. 455; or (2) he was doing something for his own pleasure—*M'Laren* v. *Caledonian Railway Company*, 1911 S.C. 1075, 48 S.L.R. 885; *Smith* (*cit.*); *Barnes* (*cit.*); *Revie* v. *Cumming*, 1911 S.C. 1032, 48 S.L.R. 831; *Kane* v. *Merry & Cuninghame*, 1911 S.C. 533, 49 S.L.R. 921; *Reed* (*cit.*). *Symon* v. *Wemyss Coal Company, Limited*, 1912 S.C. 1239, 49 S.L.R. 921, was at variance with all the other cases. The following cases were also referred to—*Harding* v. *Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747; *Watkins* v. *Guest*, 1912, 5 B.C.C. 307. The question of law should be answered in the negative.

Argued for respondents—The breach of a rule did not debar a workman from compensation—*Conway* (*cit.*); *Mawdsley* (*cit.*); *Durham* v. *Brown Brothers & Company, Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190; but it was a fact relevant to be considered in the question whether the accident arose

out of the employment. It raised a strong presumption that he was acting outside the scope of his employment—*Traynor* v. *R. Addie & Sons*, 1911, 4 B.C.C. 357, 48 S.L.R. 820; *Barnes* (*cit.*). What he did was something different from what he was employed to do. It was no part of his duty to jump on trains. It was an added peril. That in combination with the prohibition was enough to disentitle him—*Plumb* v. *The Cobden Flour Mills Company, Limited*, [1914] A.C. 62; *Revie* (*cit.*); *Symon* (*cit.*). When a workman suffered an accident in the employment of another than his master, the master was not liable—*Burns* (*cit.*); *Smith* (*cit.*); *M'Daid* (*cit.*)—but there was an exception where one did work for a fellow employee in an emergency—*Devine* v. *Caledonian Railway Company*, July 11, 1899, 1 F. 1105, 36 S.L.R. 877; *London and Edinburgh Shipping Company* v. *Brown*, February 16, 1905, 7 F. 488, 42 S.L.R. 357. But if the person for whom the work was done was not an employee at all the master was not liable—*Barnes* (*cit.*); *Plumb* (*cit.*); *Revie* (*cit.*). *Watkins* (*cit.*) was also referred to. The workman had done something different from what he was employed to do, and that in face of a prohibition. The question was one entirely of fact upon which the Sheriff-Substitute was final. The question of law should therefore be answered in the affirmative.

At advising—

LORD DUNDAS—The material facts in this case may be summarised as follows:—The appellant, aged twenty, entered the respondents' service on 3rd April 1913 as a railway porter at a wayside station in Banffshire. It was part of his duty to attend the arrival of incoming passenger trains and remove luggage from the van. On 23rd April he so attended the arrival of a train. The van stopped at the usual point, which was about twenty yards further up the platform than the spot where the appellant happened to be standing. As the van passed him he ran after it, and overtaking it as its speed decreased, tried to jump on the footboard "in order to be ready to remove the luggage as quickly as possible when the train stopped." He caught the handle of the van, but failing to get both his feet on the footboard, slipped on to the line, and sustained injuries which resulted in the amputation of his right leg between knee and ankle. When the appellant entered the service a book of the company's rules and regulations was duly handed to him by the stationmaster, and he signed the customary document undertaking to observe and obey them. One of these rules (somewhat quaintly worded) is as follows—"No servant must jump on to the steps or footboards, or run alongside of trains entering stations." The appellant does not seem to have read the rules. On more than one occasion during his brief period of service he had jumped upon the steps of an incoming train, and the stationmaster checked him for so doing, and a fellow-servant also warned him on one occasion when he did this that it was a dangerous practice. The learned arbitrator upon the facts found that the accident, "while it arose in the course of, did not arise out of, his employment, in respect that the appellant's act was (1) unnecessary, (2) obviously dangerous, and (3) not expected or required of appellant but expressly forbidden."

Now if one regards the facts of the case apart (for the moment) from the special rule of the company and the appellant's disobedience of it, they do not, in my opinion, afford a sufficient warrant for the Sheriff-Substitute's conclusion that the accident did not arise out of the employment. It is true that, as the respondents' counsel insisted, the duty of a porter is (primarily and etymologically) to carry things; but it is equally plain that the appellant's duties extended to attending the arrival of trains and removing luggage from vans, and it appears that it is the common and recognised practice of porters at this (as at many) stations, in shunting operations and the like, to board trains in motion. The indiscretion of this lad in jumping on the footboard—prompted apparently by overzeal "in order to be ready to remove the luggage as quickly as possible when the train stopped"—could not, I think, be held to amount to a departure from his proper sphere of service. He was performing his duty in an indiscreet and wrong manner, but still he was performing it.

It seems to me, then, that the place and importance in the case of the rule and its transgression have weighed unduly with the Sheriff-Substitute, and that he has in consequence arrived at an unwarrantable conclusion. There are many decisions and dicta upon the point. "Put in a single sentence, the law, I think, is perfectly well settled, that mere disobedience of an order will not take a man out of the scope of his employment" (*per* Lord Dunedin in *Burns* v. *Summerlee Iron Company, Limited*, 1913 S.C. at p. 230). In *Barnes*, 1912 A.C. at p. 47, the Lord Chancellor (Loreburn) said that you cannot deny a man compensation "on the ground only that he was injured through breaking rules." Still more recently in *Plumb* v. *Cobden Flour Mills Company, Limited*, 1914 A.C. at p. 67, Lord Dunedin pointed out that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." The rule and its transgression were no doubt facts which the learned arbitrator was entitled to have in view, not as conclusive against the workmen's claim, but along with the other facts in the case, in considering whether or not the accident arose out of the employment—*Traynor* v. *Addie & Sons*, 48 S.L.R. 820, 4 Butterworth's W.C.C. 357. But, as already said, the other facts seem to me to afford no legal basis for the arbitrator's conclusion; and I do not see that the added fact of disobedience to the rule could alter that position. If the man had, in disobedience to the alternative branch

of the rule, run alongside the train, and while doing so had tripped and fallen and met with serious injury, I do not think the arbitrator could competently have held that the accident did not arise out of the employment; and the actual event does not appear to me to be of any different quality. I am therefore constrained to hold—and the terms in which the finding is expressed seem to me to point in that direction—that the arbitrator here misdirected himself in law to the effect that disobedience to the rule took the workman out of the scope of his employment, and that his finding therefore cannot stand.

We were referred at the discussion to the case of *Plumb* v. *Cobden Flour Mills Company, Limited*, above cited, but then reported only in 30 Times L.R. 174, where Lord Dunedin delivered the judgment of the House. I gather that, so far as previous decisions are concerned, the spirit of his Lordship's very instructive opinion is rather in the direction of consolidation than of amendment or repeal. The workman, it appears, had improvised a mechanical convenience for the easier performance of his allotted task, and had, in so working, sustained injuries; and the House of Lords, affirming the judgment of the Court of Appeal, who reversed the award of the County Court Judge, held that the accident did not arise out of the employment. Lord Dunedin pointed out that it is well, in considering the numerous decided cases, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute; that though it is often useful, in striving to test the facts of a particular case, to express the test in various phrases, such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words; and that it is wrong and unfair to seize upon some phrase used by a judge in any given case and treat it as if it afforded a conclusive test for all circumstances. In the case before us I have no mind to discuss in detail the various decisions cited during the argument; but I think that, if one sets about to apply to this case some of the more familiar tests and phrases used in previous cases, the result I have indicated will be found capable of bearing such application. It seems to me, for example, that at the time of the accident this workman was acting within the sphere and scope of his employment; that he was doing his own work, though (it may be) in an improper way, and in a way in which he had been told not to do it, and was not arrogating to himself or usurping the functions of another; that he was not doing something merely for purposes of his own; and that the risk he incurred—viz., slipping between the platform and a train which had not come to rest—was one which might be reckoned as reasonably incidental to his employment as a porter. But, following Lord Dunedin's injunction, I apply my mind to the very words of the statute; and so doing, I hold that the facts disclose no grounds upon which the arbitrator could competently find that the accident did not arise out of the appellant's employment.

For these reasons I am of opinion that the learned Sheriff-Substitute's finding cannot stand, and that we should sustain the appeal, answer the question put to us in the negative, and remit to the arbitrator to proceed as accords.

LORD MACKENZIE—I am of the same opinion. I do not regard this as a case in which only one or other of two inferences might have been drawn by the learned Sheriff-Substitute from the facts. If the case had been one of that category, then even although one did not think that the inference drawn was the inference one would have drawn one's self, still the judgment of the Sheriff-Substitute as arbitrator could not have been interfered with. The best illustration of that view is to be found in the case of *Traynor* v. *Robert Addie & Sons*, 48 S.L.R. 820.

I think in the present case the Sheriff-Substitute has gone wrong upon a question of law, and that the accident here described did arise out of the employment of the workman. I turn to the reasons which were given by the Sheriff-Substitute for the conclusion which he reached, and I am unable to find any reason but one which can be regarded as sufficient. I do not think that his conclusion can be supported upon the ground that the appellant's act was unnecessary. It cannot be supported on the ground that it was obviously dangerous; nor can it be supported on the ground that it was not expected or required of the appellant.

There remains only the ground that it was expressly forbidden. As your Lordship has pointed out, it has been said in more than one case that disobedience to an order *per se* is not sufficient to disentitle a workman to get compensation. In order to disentitle him there must be something more than a mere breach of the rule.

The facts of this case have already been adverted to, and I do not require to resume them. The terms of the rule are that "no servant must jump on to the steps or footboards or run alongside of trains entering stations." I think it is too plain for argument, and I do not think counsel attempted to argue, that if this accident had occurred when the porter was running alongside of the train and he had fallen and sustained injury, that would have been an accident which did not arise out of the employment. I consider that the first part of the rule is really in the same category.

In doing what he did on this occasion the appellant may have been over-zealous in his work, but I think it is quite plain that he was doing his own work and was not doing anything for purposes of his own. He was not at the time of the accident out of the territory of his employment, nor was the act put outside the range of his service by the prohibition.

If one requires to seek illustrations from the cases that were cited to us, it appears to me that the case of this workman is much more like the case of the workman in *Mawdsley* v. *West Leigh Colliery Company*, 5 Butterworth 80, than the case of

the workman in *M'Diarmid* v. *Ogilvy*, 1913 S.C. 1103. In *Mawdsley's* case the man was told not to oil a certain machine when it was in motion; he did oil it when it was in motion; that did not prevent him from getting compensation. In the case of *M'Diarmid* the man was told not to clean a machine except upon certain stated days; he did clean it on a different day; and it was held that what he did was not within the sphere of his employment. He was not employed to do what he did when he sustained accident. It appears to me that there was no more "added peril"—a phrase which occurs in some of the cases—in the present case than there was in the case of *Mawdsley*.

I think that when the accident happened to the workman here he was within the sphere of his employment, and that the accident arose not only in the course of but also out of the employment. Therefore I think that the question should be answered in the manner proposed by your Lordship.

LORD CULLEN concurred.

The Court answered the question of law in the negative.

Counsel for Appellant—G. Watt, K.C.—W. A. Fleming. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Respondents—Moncrieff, K.C, —T. Graham Robertson. Agents—Gordon. Falconer, & Fairweather, W.S.

Friday, March 6.

FIRST DIVISION.

[Sheriff Court at Ayr.

CLARK *v.* GEORGE TAYLOR & COMPANY.

Master and Servant— Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16)—*Review of Weekly Payments—Liability of Employer where Accident Enforces Idleness, and Idleness Helps to Cause Obesity.*

On 7th October 1910 a workman was injured by accident arising out of and in the course of his employment. His employers admitted liability and paid him compensation down to 11th July 1913, when they ceased payment on the ground that he had recovered from the effects of his injuries. The workman then sent a memorandum of an alleged agreement to be recorded; the employers objected to the recording and applied for review of the weekly payments. The proceedings for warrant to record were sisted till the issue of the result of the application for review. On the motion of both parties a remit was made to a medical man to examine the workman and to report "(1) whether the defender has recovered from the effects of the injury to his body on 7th October 1910; (2) whether the defender is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages; (3) if not, whether he is fit for the work of a labourer on the surface, or for any other employment." On 8th October 1913 the medical man examined the workman and reported — "(1) The defender has recovered from the direct effects of his injury, but not from the indirect. (The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind.) (3) He is not fitted to undertake any work other than that of a more or less sedentary character—for example, a watchman." In response to further questions the medical man added on 15th November—"The man's incapacity for work has arisen from the fact that he has been doing no hard work during the last three years." It was admitted that the workman had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910.

Held (*dissenting* Lord Johnston) that the arbitrator was not entitled on these facts to find that the workman's incapacity for work, resulting from his injuries on 7th October 1910, had ceased on 8th October 1913, and to end as at that date the compensation.

Hugh Clark, miner, Ayr, *appellant*, being dissatisfied with a determination of the Sheriff-Substitute at Ayr (Valentine), acting as arbitrator under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in an arbitration between him and George Taylor & Company, coalmasters, Ayr Colliery, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration in which the said George Taylor & Company crave the Court to review, and on such review to end or diminish, as at 11th July 1913, weekly payments of twelve shillings and elevenpence claimed by the said Hugh Clark from the said George Taylor & Company, from the said 11th day of July 1913, during the total incapacity for work of the said Hugh Clark resulting from his bodily injuries, caused by his having been, on 7th October 1910, when he was employed by the said George Taylor & Company as a coal miner in Drumley Pit, Ayr Colliery, Annbank, accidentally crushed by a fall of coal at the coal face in said pit, the said accident having arisen out of and in the course of his said employment.

"The following *facts* were admitted, namely, that the said George Taylor & Company admitted liability to pay compensation, in terms of said Act, to the said Hugh Clark, and made an agreement with him to pay him compensation at the rate of twelve shillings and elevenpence weekly; that they paid him said sum per week from the date of said accident (7th October 1910) till the said 11th day of July 1913, when they ceased payment, alleging that the said