and have come to the conclusion that this reclaiming note is incompetent. But I desire to call the attention of the reclaimer's counsel to the fact that he may find a remedy in the Court of Session (Appeals) Act 1808, section 16 (48 Geo. III, cap. 151). I would also refer him to the opinions delivered in the case of *Watt's Trustees* v. *More*, (1890) 17 R. 318, 27 S.L.R. 259.

The Court refused the reclaiming note as incompetent.

Counsel for the Reclaimer—M. J. King. Agents—Simpson & Marwick, W.S.

Counsel for the Liquidator—M. P. Fraser. Agent—Harry H. Macbean, W.S.

Friday, March 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

R. & J. M'CRAE, LIMITED *v.* RENFREW.

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*"—*Intoxicated Commercial Traveller on Journey Home from Town where no Business in fact Transacted—Onus.*

A commercial traveller travelled to a town where he had customers but made no attempt to transact business. He went to the railway station in an intoxicated condition to return home. The night was dark, the station not fully lit, and the traveller short-sighted. After a non-stopping goods train had passed through the station he was found on the line with one of his legs cut off, and he died shortly afterwards. No one saw the deceased go or fall on to the line. The arbiter found that the accident arose out of and in the course of the employment.

Held that there was not evidence to justify the finding that the accident arose out of the employment.

Opinion (*per* the Lord Justice-Clerk) that neither was there sufficient evidence to justify the finding that the accident arose in the course of the employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Mrs Renfrew and others, the widow and children of Robert Renfrew, commercial traveller, Glasgow, *applicants and respondents*, and R. & J. M'Crae, Limited, bedding manufacturers, Glasgow, *appellants*, the Sheriff-Substitute (SCOTT-MONCRIEFF) granted compensation and stated a Case for appeal.

The Case stated—"The case was heard before me, and proof led on 15th December 1913, when the following *facts* were established—(1) That the respondents are the widow and the four pupil children of the deceased Robert Renfrew, who died within the Royal Infirmary, Glasgow, upon 6th August 1913, his death being due to an accident sustained by him at Beith railway station upon the previous evening. (2) That the respondents were totally dependent upon the deceased. (3) That deceased was a commercial traveller in the employment of the appellants, that he had a free hand in going his journeys, and could choose his own hours for travelling. (4) That Beith was one of the places included in his district and at which he had customers. (5) That upon the morning of 5th August last he intimated to a witness in the employment of the appellants his intention of going to Paisley, Lochwinnoch, and Beith, and was advised to call upon a customer named Hunter at Lochwinnoch. (6) That he went to Paisley and booked an order there, and afterwards came to Lochwinnoch, where by accident Hunter found him at the bar of a public-house. (7) That they had drink there and at another public-house and talked upon business. (8) That Hunter having to go to Beith, deceased proposed to go with him, adding that although late in the day he might see some of his customers, and that it was as easy to get back to Glasgow, where he lived, from Beith as from Lochwinnoch; that accordingly they hired a dogcart and drove to Beith, where they had drink in one hotel, but that at another the proprietor intimated that he would not supply because of the intoxicated condition in which the deceased then was. (9) That his friend Hunter parted with him in the street of Beith about 9 p.m., and was under the impression that he was then going to visit a customer, but that there is no evidence that deceased transacted any business in Beith upon that night. (10) That deceased was next seen about 9·40 p.m. crossing the foot-bridge at Beith station, which is about a mile or twenty minutes walk from Beith. (11) That his unsteady condition was noticed by a porter, the stationmaster, and others. (12) That after crossing said bridge he walked along the platform upon the side for Glasgow, which was twelve feet wide, and sat down upon a seat some ten feet from the edge of the platform. (13) That shortly after a non-stopping goods train had passed he was found by the porter upon the rails with his head outwards and his feet towards the platform, one of his legs being almost severed from the body. (14) That he was removed to the Infirmary and died within a few hours. (15) That no one saw deceased go or fall upon the rails, but that it is a reasonable inference that while waiting for the Glasgow train he had either fallen off the edge of the platform or been knocked off by the engine of the passing train while standing on the edge. (16) That the night was dark and the station not fully lit, as some of the lamps had been lowered or put out. (17) That deceased was short-sighted and had recently complained of his spectacles as unsatisfactory.

"I *found in law* that a commercial traveller when out upon his travels continues in employment until he returns home, and that as deceased was at Beith station, which was one within his circuit, for the purpose of returning to Glasgow after trans-

acting business, the accident arose out of and in the course of his employment.

"I found, therefore, that the respondents were entitled to compensation, and awarded the sum of Three hundred pounds to them with expenses."

The *question of law* for the opinion of the Court was—"Whether, upon the evidence as stated above, the Sheriff-Substitute could competently find that the said accident arose out of and in the course of the employment of the deceased within the meaning of the Workmen's Compensation Act 1906."

Argued for the appellants—There was an *onus* on the respondents to prove that the accident to the deceased arose out of and in the course of his employment. They must prove that the risk was a peculiar incident of the employment and not an added risk—*Lendrum* v. *Ayr Steam Shipping Company, Limited*, 1913 S.C. 331, 50 S.L.R. 173; *Rodger* v. *Paisley School Board*, 1912 S.C. 584, at 587, 49 S.L.R. 413, at 415; *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; *Warner* v. *Couchman* [1912] A.C. 35, 49 S.L.R. 681; *Butt* v. *Provident Clothing and Supply Company, Limited*, January 14, 1913, 6 B.W.C.C. 18. Mere conjecture was insufficient—*Marshall* v. *Owners of s.s. "Wild Rose,"* [1910] A.C. 486, *per* Lord Shaw at 495, 48 S.L.R. 701, at 704. In going to Beith the deceased had gone outside his employment, and accordingly the accident did not arise in the course of it. Moreover, the respondents had not proved that the accident arose out of the deceased's employment. It was not enough to say that he was found dead. The accident might have been due to the deceased's inebriated condition, and if that were so, the accident was not an accident arising out of his employment, but an accident arising out of his own misconduct —*Symon* v. *Wemyss Coal Company, Limited*, 1912 S.C. 1239, 49 S.L.R. 921; *Frith* v. *Owners of s.s. "Louisianian,"* [1912] 2 K.B. 155; *Kitchenham* v. *Owners of s.s. "Johannesburg,"* [1911] 1 K.B. 523, *per* Farwell, L.J., at 532, *affd.* [1911] A.C. 417, 49 S.L.R. 626. *Fraser* v. *Riddell & Company*, 1914 S.C. 125, 51 S.L.R. 110, and *Millar* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, 49 S.L.R. 67, were different, because in those cases the danger of an accident such as did occur was a risk peculiar to the employment.

Argued for the respondents—The question for the Court was not whether the arbiter was right, but whether there was evidence on which he could have reached the conclusion he had reached, and whether there was evidence which precluded that conclusion. In the present case there was sufficient evidence to warrant the inference which the arbiter had drawn—*Lee* v. *Stag Line, Limited*, July 17, 1912, 5 B.W.C.C. 660; *Swansea Vale* (*Owners*) v. *Rice*, [1912] A.C. 238; *Richardson* v. *Ship "Avonmore"* (*Owners*), October 16, 1911, 5 B.W.C.C. 34; *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15; *Pierce* v. *Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997. A commercial traveller continued to be within his employment until he returned home—*Dickinson* v. *"Barmak," Limited*, February 10, 1908, 124 L.T. 403. With regard to the effect of the arbiter's findings about the condition of the deceased before the accident, the arbiter had not found in fact that the accident was due to intoxication, and in any event the risk of accident occurring in consequence of drunkenness was a risk peculiar to a commercial traveller's employment, because the treating of customers was a well-known practice within the employer's contemplation. In *Fraser* v. *Riddell & Company* the accident was held to have arisen out of the employment, although the arbiter had inferred that it was due to the deceased's intoxicated condition.

At advising—

LORD JUSTICE-CLERK — On the facts as stated by the Sheriff-Substitute compensation must be payable to the respondents, even although there was such misconduct on the deceased's part as would have debarred him from compensation had he survived, if it is a fair deduction in law from the facts that the accident arose out of his employment and occurred in the course of his employment. Thus the true question to be decided is whether the facts found justify in law the inference that when the accident occurred the deceased was in the course of his employment and that the accident arose out of his employment. That on the day in question he went out by train from Glasgow in the course of his employment, and if after completing his business work he had gone to a station to make his way home he would still have been in the course of his employment; all this is clear, for if he had to journey out in his employment, his return journey to his place of residence would still be in the course of his employment. The question is whether his actions on the occasion in question must be held to be inconsistent with his being still in the course of his employment when the accident occurred. I confess that, when I look at the circumstances, I find it extremely difficult to hold that he acted in the course of his employment when at Beith and afterwards. If he thought of doing business there, there is no statement of fact that he did so. The only statement of fact regarding his being there is that he got himself into such a state of intoxication that when he went to a second public-house his condition was such that he was refused when he asked for drink because he was intoxicated. He was therefore unfit for business and was not in the course of his employment. He had chosen to take to a course of conduct which was inconsistent with his actions being in the course of his employment. I cannot for my part accept the idea that having gone out of the course of his employment he entered it again that night because he set off in his staggering drunken state to endeavour to get home. To me it appears just to say that a man, the course of whose ordinary employment would cover his return home after a journey, may break off from the course of his employment, and that it is entirely a

question of circumstances whether he can be held to have taken up the course of his employment again, merely because he later proceeds to make his way home. It is easy to conceive many circumstances where it would be out of the question to accept the argument that whatever he did in the interval the mere fact that he tried to make his way home re-set up the course of his employment. The present case seems to me a very marked one for rejecting such an idea. The man had given himself over to self-indulgence, and had got himself into a thoroughly drunken state in doing his own pleasure, and in that state, and while he remained in it, could not, as I think, be held to be in the course of his employment. For although the course of a man's employment may in particular cases, such as travellers, last till he completes his journey, that surely cannot cover conduct done before he reaches home, which has nothing to do with his employment and is inconsistent with it. That such cases may occur cannot be doubted, and the present is, as I think, as marked a case as can be conceived. I would therefore be inclined to hold that the accident here did not take place in the course of the employment.

But your Lordships not being prepared to hold that the circumstances preclude the idea of the accident being in the course of the employment, I agree with the opinions expressed that it did not arise out of the employment. It appears to me that the deceased lost his life in consequence of a direct risk to which he exposed himself by bringing himself into a drunken state, with the result that the risk he ran was not the ordinary risk of a traveller—possibly careless or rash—but a special risk, made for himself and by himself, by so indulging in intoxicants that he had not reasonable control of his movements. That being so, I cannot hold with the Sheriff-Substitute that the accident arose out of the employment. It appears to me that the case of *Kitchenham*, [1911] A.C. 417, is a strong authority against the respondents. The risk of falling off a platform in the case of a traveller is a common risk, just as the risk of falling off a quay is a common risk; and if that is so in the case of one who is sober, the case cannot be more favourable to one who has aggravated the risks by taking such a quantity of intoxicating drink as to be unable to take care of himself. He by his own wilful act exposed himself to that increased risk. We do not know how the accident happened. All we know is that a man, staggering drunk, having got on to a railway somehow or another, got down upon the rails and was killed by a passing train. There is nothing in that to make it an inference in law that the accident arose out of the employment. I therefore concur with your Lordships in answering the question unfavourably to the respondents.

LORD SALVESEN—The Sheriff-Substitute has stated with much fulness and precision the facts which he found to be established. I would only refer to one or two of his findings in order to explain how I construe them. In finding 3 it is stated that "deceased was a commercial traveller in the employment of the appellants; that he had a free hand in going his journeys, and could choose his own hours for travelling." I assume that this freedom of choice depended on his being engaged on his master's business and not in furtherance of his own affairs or amusements. In finding 8 the arbitrator omits to state the hour at which the deceased left with Hunter to go to Beith, but I infer that it was after business hours, and that when they arrived in Beith it must have been at or after 8 o'clock in the evening.

Shortly stated, what happened was this—The deceased in the course of his employment as a commercial traveller arrived at Lochwinnoch some time in the afternoon or evening of the 5th of August, and had a meeting with a customer called Hunter. They visited two public-houses, and had some form of alcoholic refreshment at each, and the deceased thereafter accompanied Hunter to Beith in a dog-cart which Hunter had hired. At Beith he did not attempt to transact any business, but instead got intoxicated, and while in this condition found his way to Beith station, where he was last seen alive sitting upon a seat some ten feet from the edge of the platform. A non-stopping goods train passed, and shortly after he was found lying upon the rails with his head outwards and his feet lying towards the platform, having received injuries from which he died within a few hours. The Sheriff-Substitute has held on these facts that the accident with which the deceased met arose out of and in the course of his employment, and the question of law which he has stated for us is whether he could competently so find in view of the evidence before him?

(1) The first question that arises is whether the deceased was in the course of his employment when he met with the accident? It may be that when he accompanied his friend Hunter to Beith in the dogcart which Hunter had hired he was in the course of his employment as a commercial traveller if he intended to call on customers of his employers or otherwise desired to further their business interests. He appears to have expressed some sort of vague intention of this kind to Hunter, but what follows shows that he did not act upon it. Instead of doing business the deceased incapacitated himself for business by having drink in one hotel to such an extent that when he went to a second the proprietor refused to supply him because of his intoxicated condition. During his stay in Beith he was not, in my opinion, in the course of his employment, but was giving himself over to self-indulgence. It may be that when he proceeded to Beith Station in order to return to Glasgow he returned to his employment, but it is obvious that he would never have been at Beith Station at all but for the jaunt which he took with Hunter, and that at all events he need not have been there at so late an hour. If the case, however, depended only upon this question I should not have been prepared to interfere with the result at which the Sheriff-Substitute arrived.

(2) Did the accident arise out of the employment? An ordinary person would, I think, unhesitatingly reach the conclusion that the accident arose, not from any of the risks to which a commercial traveller is specially exposed by his employment, but from the circumstance that he was intoxicated. He might just as easily have hurt himself by falling on the way to the station as by falling off the platform of the station. It does, no doubt, at times happen that people fall off the edge of a railway platform, or are struck by a moving train and knocked off the platform when standing on the edge, but these are contingencies (rather unusual and remote) to which all persons who frequent railway stations are exposed. It was argued, however, that commercial travellers in the course of their employment have to frequent railway stations oftener than the majority of the public, and that their employment thus more frequently exposes them to risks of this nature. Perhaps this would be of importance if the risk was one caused by the fault of employees of the Railway Company—as, for instance, if the deceased had been knocked down by a luggage barrow or injured when entering or leaving his compartment, or while he was in the compartment itself. These are risks which are associated with railway travelling; but surely it cannot be affirmed that if a man falls off the platform in a railway station for no other reason than that he was so intoxicated as not to be able to keep his balance or to see the obvious danger ahead of him, that that is a risk arising out of his employment. If it was, one would have to affirm that when a messenger got drunk in the course of executing a message for his master and fell upon the street the accident arose from his having been sent the message. There is no case to support such an extreme proposition. Where it is a messenger's duty to use a bicycle, and he is run over in the street by wheel traffic, I entirely assent to the view which has been laid down in two cases—that the accident arose out of his employment. One of the risks of using a bicycle in the public streets, and which may occur to a careful as well as to a careless rider, is that of coming in contact with other traffic. But suppose the bicyclist got drunk and fell off his bicycle because of his condition, can it be affirmed that the accident was one which arose out of his employment? Surely in this case he had voluntarily undertaken an added risk, to wit, that of riding a bicycle in an intoxicated condition. The case of *Rodger*, 1912 S.C. 584, was the case of a messenger being overcome by giddiness or faintness brought on by heat and falling while conveying a message on his employer's business. It was held that the accident did not arise out of his employment. In that case Lord Kinnear said that in order to satisfy the condition that the accident arose out of his employment "it must be shown that the injured man suffered in consequence of a risk incidental to his employment. That is to say, a risk beyond what ordinary people incur in the ordinary course of their business—one to which he was specially exposed by the nature of his employment"; and further on in his opinion he says that it was a risk which attended anyone whose business or pleasure took him into the street. Now if that can be said of a fainting fit for which the unfortunate man is not in any way to blame, it seems to me to be still more applicable to the dizzy condition which is brought about by over-indulgence in drink. The deceased's employment here did not take him near the edge of the railway platform until the train with which he was to travel had stopped at the station and made it relatively safe for him to approach the edge of the platform. The risk from which he suffered was just the risk which every intoxicated man exposes himself to if he goes to a railway station. To the ordinary sober person the use of the station is not attended with any more risk than the use of the public street, if indeed the risk be as great. We were referred to the case of *Fraser* v. *John Riddell & Company*, 1914 S.C. 125, where it was held that in the case of a driver of a traction-engine, who while driving the engine fell from the footplate and was killed, that the accident arose out of his employment although the arbitrator had found that he was under the influence of drink and unfit for his work at the time of the accident. I think that case is quite distinguishable from the present. As the Lord President said, it was just such an accident as might happen to him if he slipped his foot accidentally while perfectly sober and fit for his work. Once that conclusion was reached, his intoxicated condition could only be described as serious and wilful misconduct, which under the Act does not debar the representatives from claiming compensation. The case of *Kitchenham*, [1911] A.C. 417, appears to me to be very much in point. There a sailor, who had been on shore with leave, while returning to the quay fell into the water and was drowned; it was held that the accident arose in the course but not out of the deceased's employment. Lord Chancellor Loreburn said—"I think the accident arose from a risk common to everyone, namely, that of falling from the quay into the water, and was not specially connected with his work and employment." The case indeed seems to be *a fortiori* of the present, because a sailor in getting to his ship requires as a rule to walk along quays; and if it be said here that a commercial traveller has to go oftener to railway stations than the bulk of mankind, it may be said with even more force that a sailor's employment brings him more frequently into the neighbourhood of quays from which he may fall. The injured man in *Kitchenham's* case appears to have been sober. I cannot imagine that the case would have been any stronger for his representatives if he had been intoxicated. On the contrary, I think that it might well be said that he perished, not from a risk incident to his employment, but from one to which he had chosen to expose himself as the result of over-indulgence. I am accordingly of opinion that there are no facts here from which the Sheriff-Substitute

could competently infer that the accident arose out of the deceased's employment. (3) Even if in some circumstances the fall of a commercial traveller from the edge of a railway platform to which he had occasion to go might be an accident arising out of his employment, it of course does not follow that every such accident would necessarily be so. If, for instance, he had been larking with another occupant of the station, and in the course of doing so had slipped and fallen in front of a passing train, it is plain that the accident would have had no relation to his employment. Now here there was no evidence at all as to how the accident happened. The arbitrator conjectured that he must either have been standing at the edge of the platform and knocked over by the engine of the non-stopping goods train, or that he must simply have fallen off the edge of the platform. These two conjectures do not exhaust the possible modes in which the man met his death. He may, for instance, have proceeded to cross the line, having some vague notion in his intoxicated state that he was on the wrong side of the station, or he may have attempted to join the moving train under the idea that it was a passenger train which he had observed too late. He certainly had no occasion at the time to be near the edge of the platform, for the train by which he intended to travel had not arrived at the station. Now if he attempted to join a moving train or to cross the line on the level, he would be in breach of the company's bye-laws, and would be deliberately incurring a risk which was in no way incidental to his employment. The *onus* is upon the respondents to show that the particular accident which he met was one which arose out of his employment, and this *onus* I think they have failed to discharge. I am therefore for answering the question of law in the negative.

LORD GUTHRIE—I am of the same opinion. On the question of whether the death arose in the course of the deceased's employment I doubt the soundness of the arbitrator's inference, but I cannot say that there is no evidence to support it. I am inclined to think, looking to the late hour and the class of goods for which the deceased travelled, that his statement that he might see some of his customers in Beith was a mere excuse for going with Hunter on what was nothing but a drunken jaunt or spree. But I accept the arbitrator's judgment on this point.

On the question of whether the occurrence arose out of the deceased's employment, I think the evidence all negatives this view. A case may be conceived where the fall of a commercial traveller over a railway platform would be an accident arising out of his employment. Suppose, for instance, that he travelled for a diamond merchant, and was obliged to carry the bag containing his diamond samples in his hand. If, thus encumbered, he slipped getting into a carriage, and fell between the platform and the train, that accident would arise out of his employment, because, as compared with ordinary passengers, he was unable to part with personal possession of his luggage, and thus ran a special risk incidental to his employment. In this case I cannot see that as a commercial traveller he ran any risk incidental to his business greater than that of any ordinary traveller. I do not think it necessary to consider the question of intoxication. In the case I have figured of the commercial traveller for a diamond house, it may be, on the authority of the case of *Fraser* v. *Riddell & Company*, 1914 S.C. 125, that, even although such a person was under the influence of drink and unfit for his work, the accident which I have figured would still have arisen out of his employment. But I do not desire to indicate any difference of opinion on the matter of intoxication from the views expressed by Lord Salvesen.

Further, I concur in thinking that the respondent has not proved, either by direct evidence or by a process of exclusion, how the accident happened. It may have happened in one or other of the two ways suggested by the arbitrator. But there are other ways in which it may just as likely, if not more likely, have happened, in which it would be impossible to hold that the deceased met his death through an accident arising out of his employment.

LORD DUNDAS was not present, being engaged in the Extra Division.

The Court answered the question of law in the negative and recalled the arbiter's award.

Counsel for the Appellants—Horne, K.C. —MacRobert. Agents—Robson & M'Lean, W.S.

Counsel for the Respondents — Wilson, K.C.—Aitchison. Agents—Balfour & Manson, S.S.C.

Friday, March 20.

FIRST DIVISION.

[Lord Cullen, Ordinary.

THE STEAMSHIP "GLENSLOY" COMPANY, LIMITED *v.* LETHEM (SURVEYOR OF TAXES).

Revenue—Income Tax—Company—Method of Assessment—Business Set up within Period of Three Years Prior to Year of Assessment—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, First Case, Rule* (*i*), *and Sixth Case.*

A company which commenced business on 13th September 1911 fell to be assessed by the Commissioners of Income Tax for the year 5th April 1912 to 5th April 1913. The Commissioners computed the assessment on the first profit and loss account of the company, which terminated on 20th November 1912, a reduction being allowed in proportion as that period exceeded the period of a year. The company maintained that