alter the fact. Nor is it legitimate in my opinion to read it as making a new and substantial gift to the fifth party in the shape of a general pecuniary legacy of £100.

The Court answered the first alternative of the first question of law in the negative, and the second alternative in the affirmative; the first alternative of the second question in the negative and the second alternative in the affirmative; and the third question in the negative.

Counsel for the First and Second Parties—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Counsel for the Third Parties—J. R. Dickson. Agent—H. H. Macbean, W.S.

Counsel for the Fourth Parties—D. Jamieson. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Fifth Party—Burn Murdoch. Agent—W. B. Wilson, W.S.

Wednesday, November 18.

FIRST DIVISION.

BETT AND OTHERS *v.* HUGHES.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising "Out of" the Employment—Coachman Cycling to Get Employer's Letters.*

It was part of a coachman's duty to call, when required by his mistress, at the post office some miles distant for letters. This he might have to do every day if his mistress were at home, and perhaps not at all for a fortnight if she happened to be from home. The road was little frequented and he was accustomed with the knowledge of his employer to use his bicycle for the purpose. He was injured through a man lurching against and upsetting his bicycle. *Held* (*dub.* Lord Johnston) that the accident arose "out of" his employment in the sense of sec. 1 (1) of the Workmen's Compensation Act 1906.

Opinion per the Lord President that the frequency or infrequency with which a risk arising "out of" an employment occurs is immaterial.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1) enacts—"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, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Kinross, between Charles Hughes, coachman, Milnathort, *respondent*, and Alexander Easson Bett (now deceased) and others, *appellants*, the Sheriff-Substitute (DEAN LESLIE) awarded the respondent compensation, and at the request of the appellants stated a Case for appeal.

The Case gave the following *facts*:—"The respondent about five years ago entered the service of the deceased Alexander Easson Bett, who was a carriage hirer, as coachman. For four years he acted as a driver of a carriage and pair of horses hired from the said deceased Alexander Easson Bett by Mrs Purvis Russell at Warroch, Milnathort. He was instructed by Alexander Easson Bett to do anything he was asked and to be obliging. His duties were those of a private coachman and included calling at Milnathort Post Office for letters when so required by Mrs Purvis Russell. When Mrs Russell was from home he might not for a fortnight at a time be sent to the post office. At other times he might have to go every evening. He had also to deliver letters elsewhere. He received orders at the house through one of the maids when it was necessary for him to go. When he did go for letters he generally used his own bicycle. Both the deceased Alexander Easson Bett and Mrs Purvis Russell knew that he used his bicycle for the purpose. On the evening of 11th October 1913, when returning to Warroch from the post office with letters, he passed three people on the road in Milnathort. Of these three one man lurched against him and knocked him over. The fall resulted in fracture of his right knee-cap. He has been since and is now totally incapacitated for work. His average weekly wage amounted to 32s. It was admitted for the appellants that the accident arose in the course of the respondent's employment."

The Case further stated—"I *found in law* that the respondent was injured by accident arising 'out of and in the course of his employment' with the said deceased Alexander Easson Bett within the meaning of the Act, and found the appellants as sisted liable to the respondent in compensation at the rate of 16s. per week as from the 18th day of October 1913."

The *question of law* for the opinion of the Court is—"Whether there was evidence upon which it could competently be found that the personal injuries sustained by the respondent were the result of an accident arising 'out of' his employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellants—The respondent's employment was not such as to expose him exceptionally to the danger which caused the accident. The accident might have befallen any member of the public. In this respect the case was distinguishable from *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15, and *Pierce* v. *Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997, where the employment involved a continual passing to and fro in a crowded street. The case of *Greene* v. *Shaw*, [1912] 2 Ir. Rep. 430 (Lord Chancellor at 437, Cherry, L.J., at 438) formed an exact parallel. Similar decisions were given in *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; *Rodger and*

Others v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413; *Plumb* v. *Cobden Flour Mills, Company, Limited*, [1914] A.C. 62; *Sheldon* v. *Needham*, [1914] 30 T.L.R. 590. The meaning of "incidental to the employment" was construed in a sense favourable to the appellants in *M'Neice* v. *Singer Sewing Machine Company, Limited* (*cit. sup.*), Lord President at p. 13; *Plumb* v. *Cobden Flour Mills Company, Limited* (*cit. sup.*), Lord Dunedin at p. 68; *Pierce* v. *Provident Clothing and Supply Company, Limited* (*cit. sup.*), Cozens Hardy, M.R., at p. 999. The terms "out of" and "in the course of" were to be used disjunctively—*Fitzgerald* v. *W. G. Clarke & Son*, [1908] 2 K.B. 796, Buckley, L.J., at 799.

Argued for the respondent—The cases of *M'Neice* v. *Singer Sewing Machine Company, Limited* (*cit. sup.*) and *Pierce* v. *Provident Clothing and Supply Company, Limited* (*cit. sup.*) were exactly in point and should be followed. The question whether an accident arose "out of" an employment was mainly one of degree and of circumstances, and therefore one of fact. The Court should therefore be slow to interfere with an arbiter's decision—*Board of Management of Trim Joint District School* v. *Kelly*, [1914] A.C. 667, Lord Haldane, L.C., at 674, Lord Shaw at 710. Here the workman was clearly executing part of his duty, and his duty must be regarded as a whole. In his duty a special risk was involved, and it was immaterial whether it was one that ordinarily occurred in it or not—*Board of Management of Trim Joint District School* v. *Kelly* (*cit. sup.*), Lord Loreburn at 682. In *Greene* v. *Shaw* (*cit. sup.*) the workman's main duty lay in one field, and it was only incidentally that he passed from one field to another.

At advising—

LORD PRESIDENT—I think this case is covered by authority—authority which I the more readily follow because it appears to me to be in strict accord with the terms of the statute. The respondent was a private coachman, but his duties included calling for his employer's letters at a post office which, we are informed, was four miles away from the employer's house. He went for the letters sometimes every evening for a week at a time when his employer was at home. At other times when she was away from home he did not go for the letters for a period of a fortnight at a time. When he went he rode on his bicycle. That was known to his employer, and indeed was very natural in the circumstances. One evening, when returning from the post office with his employer's letters, a man lurched against his bicycle and upset it. He fell, was injured, and claims compensation.

It is admitted that the accident arose in the course of the respondent's employment. The arbiter has further found that it arose out of his employment. The question we have to decide is whether the facts found proved entitle the arbiter to come to that conclusion. I think they do, and I cannot express my reason for so thinking in better language than was employed by Lord Kinnear in the case of *M'Neice* v. *Singer Sewing Machine Company, Limited*, where he says—"According to the statement the man had certainly in the course of his employment to traverse this particular road for his employers' purposes, and therefore the dangers and risks of that particular road at the time and on the occasion in question are, to my mind, incidental to the employment." And, using somewhat different language, the Lord President (Dunedin) in the same case gave expression to the same view. The decision was followed in the English Court of Appeal in the case of *Pierce*, and the opinion of the Lord President (Dunedin) was expressly approved by the Master of the Rolls. But it was argued to us that the risk here was not incidental to the respondent's employment, because the employment was not one in which the workman was exceptionally exposed to the danger which caused the accident. It was said that the same accident might have befallen any member of the public who chanced to be riding a bicycle on that road at that time. That is true but irrelevant. The statute recognises no such distinction. If the distinction were sound, then the vast majority of workmen would be deprived of the benefits of this Act, because they in the course of and arising out of their daily employment encounter the very same risks which are faced every day by members of the public. Members of the public do not recover compensation, because either they are not employed or the accident happened when they were not in the course of their employment.

The argument that was advanced to us was that a risk was never incidental to the employment if it was a risk which might befall any member of the public. That argument was advanced, as will be seen from an examination of the report, in *M'Neice's* case and was there negatived, as will be seen by an examination of the Lord President (Dunedin's) opinion in the case. Therefore *M'Neice's* case is an authority precisely in point. The fallacy was admirably exposed in the opinion of Lord Justice Buckley in the case of *Pierce*, where he says—"The question whether the accident is the result of a risk to which all mankind are more or less exposed is in my judgment not an exhaustive test of the question whether or not the accident arises out of the employment. The words 'out of' necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of an employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind." But it was argued to us that there was a distinction between the case we have before us and these two decisions to which I have referred in respect of the frequency with which the workmen in these two cases were compelled by the nature of their employments to traverse the streets, and the infrequency of the respondent's visits to Milnathort Post Office.

If, it was argued, the respondent had gone oftener to the post office (how much oftener no man can tell), then the risk would have been incidental to his employment and his right to recover clear. But if he went seldom to the post office (how much more seldom no man can tell), then the risk would have been one to which all the world was liable, and his right to recover would be barred. That argument is obviously unsound for this reason, that it makes the character and quality of the risk depend upon the number of times which the workman is called upon to face it. The unsoundness, or rather the absurdity, of the criterion is, I think, well exemplified in the case before us, for it was conceded that if the respondent had harnessed his horses and driven to the post office for his employer's letters, then an accident which had chanced to befall him on the road would have been an accident arising out of and in the course of his employment, and yet it is found as one of the facts in this case that it was just as much part of the man's employment to go to and fro on the road between his mistress's house and the post office on his bicycle as it would have been to have gone in the carriage; and the carriage accident would have warranted a claim for compensation under the statute even although he had visited the post office only once in a way in the carriage instead of going regularly when he was bidden do so on his bicycle.

Traces of what I may call the heresy in this case are to be found in the opinions of the Master of the Rolls and of Lord Justice Buckley in the case of *Pierce*, where the Master of the Rolls said—"I think that this man was more exposed than other people. His employment exposed him to the risks of the streets practically all day long, allowing only for the intervals of going inside the houses of the people he was visiting." And in Lord Justice Buckley's opinion where he says—"In the case before us the man was a collector and canvasser, and for the purposes of his employment it was his duty throughout the day to be continually passing from place to place through the streets. He was thus exceptionally exposed to street accidents." Now if in that case the learned Master of the Rolls and Lord Justice Buckley would have denied the man compensation if he had only gone upon the streets on his bicycle on rare occasions and not often, then I respectfully dissent from that view, for I do not think that the right to compensation can depend upon the number of times upon which a man performs his duty. A risk may be incidental to an employment even although the workman has to face it only at wide intervals of time; and if the Irish case which was cited to us—*Greene*, 1912, 2 I.R. 430—and the recent case in the English Court of Appeal—*Sheldon*, [1914] 30 T.L.R. 590—really turned upon the doctrine that a risk is not incidental to a workman's employment when it is a risk which any member of the public may be called upon to face, then I very respectfully dissent, because it appears to me that such a doctrine is antagonistic to the terms of the statute which we are here administering.

In the present case the arbitrator has found as a fact that the risk which caused the accident which befell the man on the occasion in question was one incidental to his employment, and the evidence, in my opinion, warranted that conclusion. I am therefore for answering the question put to us in the affirmative.

LORD JOHNSTON—I experience considerable difficulty in the decision of this case.

The injured man was a coachman—for the purposes of the case a private coachman. One of his duties was, when required—and I gather that this was practically every day when his mistress was at home—to go from Warroch House to Milnathort with and for letters. He generally used his bicycle, and this, though not ordered by, was known to, his employer, and inasmuch as Warroch is more than four miles from Milnathort, I think it was in the circumstances the natural means of locomotion. But adopting what was said in *Pierce's* case, I can draw no distinction between that and any other mode of locomotion. On the occasion in question here, a man, presumably intoxicated, lurched against the coachman, as he was passing through Milnathort, and upset him, in consequence of which he was injured. In these circumstances the accident plainly happened in the course of the man's employment. Did it arise out of his employment? The two recent and leading cases of *M'Neice* and *Pierce* leave, I think, something to be desired in clearing up the question of law that arises. In *M'Neice's* case a salesman and collector for the Singer Company—I gather really a house-to-house canvasser and instalment collector—worked a district in the Cathcart suburb of Glasgow. His mode of locomotion was by bicycle. He was kicked on the knee, while riding through the street in the course of his duty, by a passing horse and incapacitated. In *Pierce's* case a man in the same class of occupation, and riding a bicycle in the course of his employment, was knocked down by a tramcar in Birkenhead and killed.

Both these men were exposed to the dangers of the streets in the course of their employment. The restive horse and the tramway car were both admittedly dangers of the streets. These dangers were recognised to be dangers to which they were exposed in consequence of their employment—in other words, to be incidents of their employment—and therefore they were held to have sustained injury by accident arising out of their employment.

Where I have difficulty is in satisfying myself whether the matter at issue is affected by the question of degree or not. The risk or danger, so far as it can be called a risk or danger of the streets, is one to which all who traverse the streets are exposed. One view of the legal situation, as it arises in the application of the statute, may be this—That by reason of his employment the employee is obliged to traverse the streets,

and therefore is by reason of the employment exposed to this though a common danger. It is therefore incident to or arises out of his employment. The simple obligation to traverse the streets in the course of his employment thus becomes the root of the liability. There is, it seems to me, a danger in this train of reasoning of making "arising out of" a mere pleonasm, satisfied by anything which satisfies "in the course of." Moreover, I do not see where the application of this interpretation can stop. I think that you cannot stop short of holding, in its logical application, that liability under the statute attaches wherever a servant is sent once in a way on a particular message, and is injured by slipping on something on the street, or by tripping on some unnoticed obstacle on the road. But another view is that liability attaches in respect that the employee is exposed to a common danger of the streets to a degree markedly in excess of members of the ordinary public, by reason that the nature of his employment requires him to be constantly traversing the streets.

I express my doubt of the true ground of the judgment in these cases, and think it material, because this is just one of those cases in which the danger arises, which has often been noted in the administration of the Act, of one judgment logically compelling an advance to another, which ultimately stretches the enactment beyond the intention.

I have carefully considered the opinion of Lord Dunedin, and also that of Lord Kinnear, in *M'Neice's* case, and it is difficult to read them otherwise — though I doubt whether their Lordships so intended—than meaning that the mere fact that the employee had to traverse the street in the course of his employment was sufficient to found liability, and that this ground of liability was not affected by the question of degree. I cannot, however, reconcile my idea of what Lord Dunedin meant with his reference to the opinion of the Master of the Rolls in *Macdonald* v. *The Owner of the Banana*, [1908] 2 K.B. 926, although his Lordship is, I think, under misapprehension in saying that he referred to the passage in *M'Kinnon* v. *Millar*, 1909 S.C. 380. In *Macdonald's* case, at p. 929, Cozens Hardy (M.R.) gives as an illustration the case of a master sending a domestic servant, as an isolated occasion in his or her service, to deliver a letter, and of the servant being knocked down by a motor omnibus, in which case he assumed that liability would arise, though the servant might never before have been exposed to the risk in the course of his or her service. It is this passage to which I understand Lord Dunedin referred. Yet I cannot read the judgment in *Pierce's* case without seeing that the question of degree did enter into it, and that the conclusion was reached by reason that by the nature of his employment the employee was exceptionally exposed to a class of accident to which all passers-by are exposed. In particular, I think that Cozens Hardy (M.R.) himself understood Lord Dunedin's opinion in *M'Neice's* case in the sense which I venture to suggest that his Lordship intended. My impression is that Lord Dunedin really took for granted the *species facti* without thinking it necessary to explain that the employee was by reason of the nature of his employment exceptionally exposed to the ordinary dangers of the streets. I find support for this also in the opinions of both Lord Dunedin and Lord Kinnear delivered in the case of *Rodger* v. *Paisley School Board*, 1912 S.C. 584.

If I may revert to a matter to which I have already referred, viz., the statute, and to the necessity of the employee in support of his claim satisfying the arbitrator that the injury was caused by accident both "arising out of" and "in the course of" his employment, and the danger of reducing either of these conditions to a mere synonym of the other, I would shortly state my own opinion as to the effect of the statutory provision when applied in present or similar circumstances. That the accident should "arise out of" the employment it must be occasioned by a risk incidental to the employment. A risk incidental to the employment may also be a risk common to the public. That a risk common to the public should be a risk incidental to the employment the employee must be exceptionally exposed by his employment to the common risk. If "exceptionally," then there must arise a question of degree.

If I am right in the view above stated, when I come to this case in particular, I find that in the matter of degree it is a very narrow one. In the first place, the coachman's duty to go into Milnathort was not the man's main duty. It is a side issue in his employment, and it is not therefore as though he was spending his day, as the men in the cases of *M'Neice* and *Pierce*, upon the streets. In the next place, he was spending that part of the time which he devoted to this matter upon a country road and the street of a country village, not, as they did, on the crowded streets of a busy part of Glasgow. And in the last place, I cannot regard the risk of rubbing shoulders with, and so being jostled by, another person, whether drunk or careless, a risk of the streets of the same degree as those to which in the cases referred to the injured persons were exposed.

It is therefore, I think, a difficult question to determine whether this is really a case in which the facts justified the judgment, and that question is one of mixed fact and law. On the law I appear to differ from your Lordship. The element of fact is largely one of impression. My impression is in favour of the appellants, but in that matter I should acquiesce in the view of the majority of the Court.

LORD ORMIDALE—It is admitted that the injury in respect of which the respondent claims compensation was personal injury by accident, and that it arose in the course of the respondent's employment. It is contended, however, that it did not arise "out of" his employment. In my opinion it did.

The respondent's duties were those of a private coachman, and included calling for

letters at Milnathort Post Office when required to do so by Mrs Russell. This necessitated his traversing the road on which the accident occurred. He had to perform the duty every evening, or it might be only once a fortnight, according as Mrs Russell was or was not in residence at Warroch. Milnathort Post Office is four miles from Warroch, and to cover this distance the respondent used not a carriage and horses but his bicycle. It was well known to his employer that he did so, and his employer took no exception to his doing so. It was thus recognised and approved by his employer as a fit and proper mode of locomotion for her employee to adopt in the performance of his duty, and, looking to the distance which he had to travel, this was natural and reasonable. In these circumstances the law which it seems to me falls to be applied is that stated in the case of *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 11, where the same section of the Act was under construction. In that case a salesman and collector while riding in the street on a bicycle in the course of his employment was kicked on the knee by a passing horse and incapacitated from work. Lord Dunedin said—"The only question to be determined that has been argued before us is whether the accident 'arose out of his employment.'" Now I think it did. I think it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as collector forced him to traverse the streets. And I think therefore that a danger which is an ordinary danger in the street . . . is therefore a danger arising out of his employment. It is quite true that many members of the public are exposed to the same danger, but that does not seem to me to be the criterion. These many members of the public might be either parties who are in employment or who are not. . . . But here the man in the course of his employment is compelled to go into the streets. . . . I think the appellant was injured by a danger arising out of his employment." That case was specially approved in *Pierce* v. *Provident Clothing and Supply Company, Limited*, [1911] 1 K.B. 997. No doubt two of the Judges who took part in the decision of *Pierce* dwell upon the fact that the injured man in that case was by his employment specially exposed to the danger of the street, but while that was undoubtedly a fact in the case, the ground of judgment was truly as in *M'Neice* that the man because of his employment was forced to be on the street on a bicycle. The Master of the Rolls, after quoting the earlier portion of the passage from Lord Dunedin's opinion which I have just read, adopts the decision therein expressed. Now in the present case the employment of the respondent forced him to be on the road in question, and it does not appear to me to matter that other bicycle riders were liable to the same danger of the road as he was—the risk of being lurched into by a foot-passenger. The risk arose to him because he was riding a bicycle in the performance of his duty—or, as it is sometimes phrased, "within the scope of his employment." It was a risk therefore, so far as he was concerned, incidental to his employment. I do not think that it can be described as a risk "common to all mankind," as the risk was held to be in the frost-bite case *Warner* v. *Conchman*, [1911] 1 K.B. 351, and one of the lightning cases, *Andrew* v. *Failsworth Industrial Society, Limited*, [1904] 2 K.B. 32, although it may have been a risk common to all bicycle riders in that part of Kinross. The outstanding point is that the accident would not have happened to the respondent unless he had been on a bicycle, and that he was on a bicycle on the road in question because—and on the facts stated in the case only because—his duties required him or permitted him, which in a question of this kind is the same thing, to be on a bicycle on the road in question. Accordingly, in my opinion, the accident arose "out of the respondent's employment."

In the view I take it does not matter at all whether the respondent had occasion to be frequently on the road on his bicycle. If the accident had occurred on the first and only occasion on which he required to be on the road, I should have come to the same conclusion, but if it were necessary for the respondent to show that he was because of the nature of his employment specially exposed to the ordinary dangers of the road, then I should be prepared to hold on the facts stated that because of the number of times he had to go to the post office he was exposed to the risks of the road to a degree beyond the normal.

The cases of *Sheldon* v. *Needham*, [1914] 30 T.L.R. 590, and *Green*, [1912] 2 Ir. R. 430, so much relied on by the appellants, were quite different from the present. The facts in the former brought it directly under the law of *Andrew*. In the latter, as I understand the report, the herd was not of necessity using his bicycle at all—he was not using it to further his employer's purposes. As Lord Justice Holmes put it, "It was not part of the duty of the herd to ride on a bicycle. He was riding on it for his own convenience when the accident, unconnected with his employment, occurred."

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

Counsel for the Appellants—MacRobert. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.