cient to say that the observations in *Turner's* case show that the decision in *Hutchinson* does not apply to a case such as we are here considering.

Accordingly I am for adhering to the rule followed in *White*, *Kennedy*, and *Tod*, and for answering the first question in the negative and the second in the affirmative.

LORD DUNDAS—I agree. I do not think the question raised in this case involves any serious difficulty. But for the presence of the clause declaring the annuity to be purely alimentary there would—and this I think is conceded—be no difficulty at all. If that clause had been absent the beneficiary, the sister who survived the testator, would undoubtedly have been entitled to claim the capital sum. But one must consider whether the presence of this clause makes any material difference. I agree with your Lordship that in the existing state of the authorities the answer to that question must be in the negative. It is sufficient to refer to the cases of *Kennedy* and *Murray*, and the opinion of Lord President Inglis in *White*.

If there be here no direction for a continuing trust, I think the third party must succeed, for it is well settled that the Court cannot supply the machinery of a trust—if that be lacking—however clear the intention and desire of the testator may be. It was suggested that as a matter of construction the words of this instrument might be so read as to import a continuing trust to this extent at least, that they contain a direction, or at all events a power, to the trustees to take out an annuity in their own names and pay the money to the annuitant. I do not think that construction is admissible where the direction is to purchase an annuity "on the life of and payable to my sister." Nor, in my opinion, can the second party get any assistance from the clause ingeniously referred to by Mr Wilson, which says—"In general I empower my trustees to do everything which in their discretion they may conceive to be for the interest of my estate."

With regard to the case of *Hutchinson*, it has been suggested that that case is not altogether consistent with the main body of authority. But it does not profess to differ from the previous authorities, and I am not at all sure that it is inconsistent with them. It may be that the case of *Hutchinson* might, if occasion arose, be reconsidered, as seems to have been the view of Lord President Dunedin in the case of *Turner*. But it is sufficient to say that *Hutchinson's* was a very special case, and has no direct bearing on the one now before us.

I agree that the question should be answered as proposed by your Lordship.

LORD SALVESEN— I am of the same opinion. I think this case is ruled by the authorities to which your Lordship in the chair has referred, and I do not think that the decision in *Hutchinson*, has any application to the circumstances of this case. At present I see no reason to think that that decision may not stand along with the other cases to which we were referred, because of the specialty that the trustees there were directed to purchase a Government annuity, which by statute is declared to be non-assignable. It is true that the purchase of such an annuity will not afford complete protection, for it will not protect an annuitant in the case of insolvency; but short of that it effectually prevents the assignation of the annuity to a third party, and so affords a very large measure of protection to any person who is not entirely reckless with regard to his financial future.

LORD GUTHRIE—I am of the same opinion. It is clear enough that the result, owing to the testator's failure to provide the machinery necessary to give effect to his intention, is unfortunately inconsistent with his obvious wishes. He was a solicitor, and his will was executed after the date of the cases on which your Lordships proceed. There appears to be complete ignorance not only among the public, but to a certain extent in the profession, as to what is necessary if it is desired to provide that a beneficiary shall have an absolutely certain income for his necessities during his lifetime. Whether the benefit is conferred *inter vivos* or *mortis causa* I am afraid that the public believe that the purpose can be effected simply by purchasing an annuity or ordering an annuity to be purchased in the beneficiary's name in ordinary terms. That of course is not so; nor will it be so even if the bond of annuity granted by the insurance company is declared to be subject to the condition that the annuity shall be alimentary and not assignable or alienable. I agree with your Lordships that there must be either a continuing trust or a direction to constitute a separate trust, and I agree that neither is to be found in this will.

The Court answered the first question of law in the negative and the second question in the affirmative.

Counsel for the First and Second Parties—Chree, K.C.—D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Third Party—Moncreiff, K.C.—Cooper. Agents—Wylie, Robertson, & Scott, S.S.C.

Wednesday, November 10.

SECOND DIVISION.

[Sheriff Court at Glasgow.

STEWART *v.* M'INTYRE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—"*Arising out of and in the Course of the Employment*"—*Dock Labourer after being Told to Stop Work Found Drowned at Quayside.*

A dock labourer engaged with others in unloading a ship was seen by the clerk in charge to be the worse of drink, and told to leave the work and wait in the shed till his pay was brought him. Within half an hour he was found

drowned in the water at the quayside. *Held* that his death did not result from accident arising out of or in the course of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of Mrs Agnes M'Kinnon or M'Intyre, widow of Robert M'Intyre, Glasgow, as an individual and as tutor for her pupil children, *respondent*, against J. G. Stewart, steamship owner, Customs-House Quay, Glasgow, *appellant*, the Sheriff (FYFE) awarded compensation, and at the request of the employer stated a Case for appeal.

The Case stated—"The following *facts* were established:—1. That appellant on 19th November 1914 had a steamer, the s.s. 'Bonawe,' at Glasgow Harbour with an inward cargo of flour in bags. 2. That to discharge this cargo appellant engaged a squad of eleven dock labourers. 3. That of these one was placed at the hatchmouth, four worked in the vessel's hold, and the other six worked on the quay. 4. That the bags were swung out of the ship's hold on to a table on the quay, and then carried by men from the table into the shed. 5. That the now deceased Robert M'Intyre was one of the six men who were engaged carrying bags from the table to the shed. 6. That Robert M'Intyre was regarded as a good carrier, and his earnings though intermittent represented an average weekly wage of 25s. 7. That he had been engaged at work all day on the 19th November. 8. That the only intervals dock labourers get from their employer is an hour for breakfast and an hour for dinner; that it is within the knowledge of employers that such men are in the habit, without asking leave, of going at other times to a public-house near the harbour for liquor refreshment. 9. That the said Robert M'Intyre had in the course of the day made several visits to this public-house, and when he returned from one of these visits about 5 p.m. and resumed carrying bags the appellant's clerk, who was in charge of the squad, considered him unfit to continue work owing to his drunken condition, and directed him to sit down in the shed, where his money would be brought to him. 10. That in accordance with the practice in the employment of such men a man may leave the work at any moment or may be paid off at any moment without previous notice. 11. That appellant's clerk went to the appellant's office for the money, but when he returned he did not find M'Intyre where he had left him. 12. That M'Intyre's body was shortly afterwards, and before working hours had expired, found in the water about opposite the place where he had been working. 13. That respondent, who is aged twenty-three, is the widow of the said deceased Robert M'Intyre and the mother of his two children, one aged about three years and the other about eighteen months, and they were all wholly dependent on deceased's earnings.

"I *found in law* that the drowning of the said Robert M'Intyre having been an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906, the respondent was entitled to an award of compensation as craved. I assessed the compensation at £195, and ordained the appellant to consign the same in the hands of the Sheriff-Clerk, and found the respondent entitled to expenses."

The *question of law* for the opinion of the Court was—"On the facts above set forth, was I entitled to hold that the deceased Robert M'Intyre met his death by accident arising out of and in the course of his employment?"

The arbitrator added this *note*—"The pursuer here is the widow of the now deceased Robert M'Intyre. It is not disputed that on 19th November 1914 he was in defender's employment, and had been engaged in their work all day. By five o'clock in the afternoon he was considerably under the influence of drink, but it is not proved that he was unfit for work. Defender's clerk regarded him at five o'clock as no longer worth paying to work, and so resolved to pay him off; but several witnesses say they saw him after that time actually carrying bags. At what stage of the day's tippling a dock labourer becomes incompetent for work it is very difficult to say, and in this case the evidence is contradictory as to his fitness. Three witnesses thought him unfit. Three others thought him quite fit. The *onus* of proving unfitness is on the defender. How M'Intyre got into the water is not cleared up by the proof. Being dazed with drink, he may have walked over the quay, or he may have tried to go on board the ship and fallen from the ladder, or he may have got on board and fallen over the ship's side; but one thing is clear, that he somehow fell into the water and was drowned, and I think the legal situation is that this happened whilst he was still in the course of his employment with defender. A dock labourer's engagement to work begins when he is taken on, and ends when he is paid off. One can conceive of some special case where the employment has been definitely ended although the labourer has not yet actually been handed his money, and defender makes out this to be such a special case; but the proof would require to be very special to establish that the employment had ended at a point of time other than the point of time at which the labourer is paid his money, and I do not think the proof in this case is sufficient to establish such a special case. The *onus* of establishing that M'Intyre's employment had ended before he fell into the water rests upon defender, and I do not think that he has discharged that *onus*. It is certainly very hard that defender should have to pay compensation for the death of a man who in all probability brought about his own death by his too frequent visits to the public-house in the course of his day's work, but workmen's compensation law has been so broadly interpreted by the Supreme Courts that I do not seem to have any option here but to award compensation, although I do so reluctantly. It rested upon pursuer, of course, in the first place, to prove that the death of M'Intyre was a

casualty arising out of and in the course of his employment, but I think she has discharged this *onus* when she has established, as she has done, that he was found drowned at the place where he was working, within working hours, upon a day he was in defender's employment. The *onus* then shifts to defender to prove that the employment had terminated whilst M'Intyre was yet alive and uninjured, and that he was drowned after he had ceased to be in defender's employment. This *onus*, as I have said, I do not think defender has succeeded in discharging."

Argued for the appellant—The respondent was not entitled to recover compensation. The employment of the deceased had terminated, and the accident therefore did not arise in the course of his employment—*Murphy Sandwith* v. *Cooney*, 1913, 7 B.W.C.C. 962, 48 Ir. L.T. 13; *Frith* v. *Owners of S.S. "Louisianian,"* [1912] 2 K.B. 155; *Smith* v. *South Normanton Colliery Company*, [1903] 1 K.B. 204. In any event the accident did not arise out of his employment. Even if his employment continued till he was paid, the sphere of the employment was restricted to sitting still. The fact that he was drunk would not debar him from compensation if he was doing something he was required to do, but that was not the case here—*Kitchenham* v. *Owners of S.S. "Johannesburg,"* [1911] A.C. 417, 49 S.L.R. 626; *Fraser* v. *Riddell & Company*, 1914 S.C. 125, 51 S.L.R. 110; *Williams* v. *Llandudno Coaching and Carriage Company, Limited*, [1915] 2 K.B. 101; *Renfrew* v. *R. & J. M'Crae, Limited*, 1914 S.C. 539, 51 S.L.R. 467; *Nash* v. *Owners of S.S. "Rangatira,"* [1914] 3 K.B. 978; *Lendrum* v. *Ayr Steam Shipping Company, Limited*, 1914 S.C. (H.L.) 91, 51 S.L.R. 733. The distinction was between a risk common to all mankind and created by the drunkenness of the claimant, and a risk which was not common and which might have happened to a sober man as well as to a drunk one.

Argued for the respondent—The accident arose out of and in the course of the employment. The instructions of the foreman did not amount to dismissal. Therefore the employment was not terminated—*Richardson* v. *Owners of Ship "Avonmore,"* 1911, 5 B.W.C.C. 34; *Riley* v. *William Holland & Sons, Limited*, [1911] 1 K.B. 1029. The only alternatives in the present case were murder, suicide, or accident, and it had been held that where there was an absence of direct evidence as to how the death had been occasioned, the Court assumed an accident. The Court would not hold the other two alternatives unless there was direct evidence pointing to them—*Furnival* v. *Johnson's Iron and Steel Company, Limited*, 1911, 5 B.W.C.C. 43; *"Swansea Vale" (Owners)* v. *Rice*, [1912] A.C. 238; *Mackinnon* v. *Miller*, 1909 S.C. 373, 46 S.L.R. 299.

LORD JUSTICE-CLERK—[*After narrating the facts*]—I think that these facts are probably sufficient to justify a finding that there was an accident, and indeed this was not seriously disputed by the appellant, but he maintained that, assuming there was an accident, there were not sufficient facts to justify the arbitrator in finding that the accident either arose out of or in the course of his employment. It lay with the applicant to establish beyond reasonable doubt that both of these conditions had been fulfilled, but I think that the facts stated do not justify a finding that either of the conditions was satisfied.

I notice that the arbitrator in the appendix containing the note to his interlocutor says this—"How M'Intyre got into the water is not cleared up by the proof. Being dazed with drink, he may have walked over the quay, or he may have tried to go on board the ship and fallen from the ladder, or he may have got on board and fallen over the ship's side; but one thing is clear, that he somehow fell into the water and was drowned." Later on he says—"The pursuer here has proved that about five o'clock M'Intyre was on the quay in defender's employment, and that within about half an hour thereafter his drowned body was taken from the water. The essential fact is proved that the accident of falling into the water occurred. How it occurred is not of material consequence."

I confess it seems to me that the last observation is quite unwarranted. The question as to how the accident occurred is of material consequence, and the fact that the accident of falling into the water occurred may be an essential fact, but it certainly is not the essential fact. The accident may have happened in many ways, some of them arising out of, some of them in the course of, and some of them neither arising out of nor in the course of, the employment; but, as I have said, we have no sufficient evidence here on which any judge or jury would be entitled to come to the conclusion that the accident of the man getting into the water both arose out of and in the course of his employment.

The man had been told by the clerk, who had authority over him and had charge of the squad, that he was to leave his work and sit in the shed and wait there until his money was brought to him. That was a perfectly proper instruction for the clerk in charge to give if it were for no other purpose than to avert the accident which ultimately happened—namely, a drunk man getting into the water and being drowned. Without discussing the authorities, I think the cases—such as *Renfrew* v. *R. & J. M'Rae, Limited*, 1914 S.C. 539—amply justify the course I propose to your Lordships, which is that we should answer the question put to us in the negative in respect that there is no sufficient evidence to show that this accident arose out of the deceased's employment or in the course of that employment.

LORD DUNDAS—I am of the same opinion. The question put to us includes three sub-questions—namely, was the arbitrator entitled to hold that M'Intyre met his death by accident? if so, was it an accident arising out of the employment? and, *separatim*, was it an accident arising in the course of

the employment? Each and all of these sub-questions must be answered in the affirmative if the applicant is to succeed.

As regards the first question I agree in thinking that in the present state of the authorities it should be answered in the affirmative. There was evidence entitling the Sheriff to hold that there was an accident. As to the question whether it arose in the course of the employment, I have, to say the least of it, very grave doubt. I think there was not any evidence, looking to the fact in the ninth finding; and I am not prepared to accept as a correct proposition in law the sentence in the arbitrator's note where he says, "A dock labourer's engagement to work begins when he is taken on, and ends when he is paid off." But however that matter may stand, I am quite clear, as your Lordship is, that the applicant must fail upon the remaining branch of the question, because I do not think that there is any evidence at all that this accident arose out of the employment. Some cases have gone very far in the way of sustaining inferences drawn by arbitrators upon questions of this sort. I think *Lendrum* v. *Ayr Steam Shipping Company, Limited,* 1914 S.C. [H.L.] 91, is probably the high watermark in that direction. But if we were to affirm the conclusion that the respondent wishes us to affirm in this case, we should be going a great deal further than the *Lendrum* case. I therefore agree that we should answer the question in the negative. I agree with the arbitrator that it would be "very hard that defender should have to pay compensation for the death of a man who in all probability brought about his own death by his too frequent visits to the public-house in the course of his day's work," and I am glad that there is, as I hold, no good ground for coming to such a conclusion.

LORD SALVESEN—I agree. I think that the accident here did not occur in the course of this man's employment. I read the findings of fact as meaning that the clerk who had charge of this squad, finding that M'Intyre was unfit to continue work, discharged him from further work. He, no doubt, said to him that he should go and sit down in the shed, and that his money would be brought to him, but that was not an order in the course of his employment that this man was bound to obey. He could have gone home, disregarding the advice of the clerk, and next day could have called for his wages; he would not have forfeited them by disobeying the instruction or failing to take advantage of the advice.

There have been cases where it has been held that a man, after he has been discharged from work, may still continue in the employment, so that if an accident occurs to him when he is leaving his work he may come within the scope of the Act. There is also the case in which Lord Justice Buckley dissented (*Riley* v. *William Holland & Sons, Limited,* [1911] 1 K.B. 1029), of a woman who was dismissed on a Wednesday, but whose duty in accordance with her contract of previous service was to call at the office on the following Friday to get her wages, and who met with an accident while she was descending the stair of the mill. I cannot say that I am much impressed by the views taken by the majority there, and personally I should have been disposed to agree with Lord Justice Buckley. But we are not in the region of a case of that description here.

This man was discharged from work, and if he attempted to resume work by carrying bags, or doing anything connected with the discharge of the ship, he was not acting in the employment of the appellant. Accordingly I think this accident did not occur in the course of this man's employment. I dissent from the view that his employment did not cease until he had actually the cash in his hands, which appears to have been the ground upon which the Sheriff held that the employment had not terminated.

I also agree with your Lordships upon the other point that there is no evidence that this accident arose out of the employment. Assuming that the employment continued, it continued for the limited purpose of enabling him to receive his money, and for that purpose only. How this accident could possibly be connected with an employment which involved only a sitting position and an expectant attitude I cannot understand.

LORD GUTHRIE—I agree. We have here the arbitrator's note, but the Court has not yet settled for what purpose and to what effect an arbitrator's note may be used by us. So far as the facts go, it appears from the note that the Sheriff came to certain important conclusions in fact which are not embodied in the findings in fact. These clearly we cannot found upon. We can only proceed upon the findings. On the other hand it is clear that we can use the note to see whether the Sheriff has misdirected himself in law. I agree with your Lordship in the chair that he has done so on both the essential questions arising under the statute, and that this mistake has led to an erroneous conclusion in regard to the question whether the accident happened in the course of the employment, and also in regard to the question whether it arose out of the employment.

The Court answered the question of law in the negative.

Counsel for the Appellant—Horne, K.C.—Carmont. Agents—J. & J. Ross, W.S.

Counsel for the Respondent—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.