the analysis of the finance made in Lord Parker's judgment.

I am of opinion that the appeal should be dismissed with costs.

Their Lordships dismissed the appeal.

Counsel for the Appellant—Clauson, K.C. —Smith Clark. Agents—J. & D. Smith Clark, W.S., Edinburgh—Murray, Hutchins, Stirling, & Company, London.

Counsel for the Respondents—Macmillan, K.C.—Wilton. Agents—Davidson & Syme, W.S., Edinburgh—Faithfull & Owen, London.

COURT OF SESSION.

Tuesday, January 11.

SECOND DIVISION.

[Sheriff Court at Oban.

M'LEAN *v.* MACBRAYNE LIMITED.

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

A seaman who was employed on a motor ship, which was pulled up on a slip on the island of Kerrera, opposite Oban, for the purpose of its annual overhaul, was allowed with the rest of the crew to leave work at 5·30 p.m., either sleeping on board or in Oban at their option. While bringing back to the ship from Oban, about 10 p.m. one night, another member of the crew in a small boat, which did not belong to the ship, he was drowned by the overturning of the boat. *Held* that the accident did not arise out of his employment.

In an arbitration in the Sheriff Court at Oban under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in which Sarah M'Coll or M'Lean, widow, Tobermory, mother of the deceased John M'Lean, late seaman on board the motor ship "Lochinvar," dependant of the said John M'Lean, *respondent*, claimed compensation from David Macbrayne, Limited, shipowners, Oban, *appellants*, the Sheriff-Substitute (WALLACE) found the respondent entitled to compensation, and at the request of the appellants stated a Case for appeal.

The Case stated—"The said deceased John M'Lean was a seaman on board the motor ship 'Lochinvar,' belonging to the appellants, and on or about 18th June 1914, by an accident, met his death by drowning. The accident happened while the 'Lochinvar' was undergoing her annual overhaul at the island of Kerrera, and while the said John M'Lean was conveying another deck hand of the said ship named John Cameron from the shore at Oban to the vessel, about 11 o'clock p.m., the boat in use by the said John M'Lean upset or swamped, and the occupants falling into the sea the said John M'Lean was drowned. The accident happened in the sea channel between the north-west end of Oban Esplanade and the slip on the opposite island of Kerrera, belonging to John Munro Limited, on which the 'Lochinvar' was drawn up.

"I found the following *facts* admitted or proved:—1. The respondent is a widow, and resides at 57 Main Street, Tobermory, and the appellants are shipowners carrying on and having a place of business at the North Pier, Oban. 2. The deceased John M'Lean, who was a seaman on board the appellants' motor ship 'Lochinvar,' was a son of the respondent. 3. At the date of the accident after referred to the 'Lochinvar' was hauled up on Munro's slip in the island of Kerrera undergoing an annual overhaul. She went on said slip on 15th June 1914, and remained there till 19th June following. 4. Said slip forms part of a piece of ground about 8 acres in extent occupied by Messrs John Munro Limited, Oban, and is surrounded on three sides by private ground, through which there is no road or right of access to the slip. 5. While the 'Lochinvar' was on the slip the crew were employed in painting and cleaning her, their working hours being from 7 in the morning till 5·30 in the evening. 6. The majority of the crew resided in Tobermory, and while engaged in regular passenger service the 'Lochinvar' remained overnight at that port. When she did so the crew were free either to sleep on board or to go to their own homes. The said deceased John M'Lean commonly but not invariably slept on board. 7. While the 'Lochinvar' was on the slip at Kerrera the crew were free to spend their evenings after 5·30 as they pleased, and while there was no obligation on them to sleep on board accommodation as usual was provided for them, which they were free to occupy or not as they pleased. 8. Both while on passenger service and while on Munro's slip the crew of the 'Lochinvar' had to provide and cook their own food and to provide their own bedding and blankets. 9. It was an implied condition of their contract of service that while the 'Lochinvar' was on Munro's slip the crew were free to go to Oban after 5·30 in the evening, either to purchase provisions or for such other purpose as they pleased, and to return either that evening or at any other time so long as they turned up at work by seven o'clock the next morning. 10. During the time of her overhaul the boats of the 'Lochinvar' remained on her davits. They were therefore not in use to convey members of the crew from the island to Oban, and the crew were expected to make their own arrangements for their conveyance to and from Oban. 11. The 'Despatch,' a small steam launch belonging to John Munro Limited, was used for the purpose of conveying Messrs Munro's workmen from the island to Oban where they resided, and in the course of the day usually made several trips for that purpose. The workmen were always conveyed from Oban to the island at 6·45 in the morning, work beginning for them at 7, and *vice versa* at 5·30 in the evening, when they stopped work for the day. 12. By the courtesy of Messrs Munro

any member of the 'Lochinvar' crew who desired a passage in the 'Despatch' was always obliged, and so members of the crew could always count on a passage on board the 'Despatch' at these two hours. When landed in Oban in the evening it was, however, left to the crew either to make their own arrangements for their return that evening or to come by the 'Despatch' the next morning. 13. On the afternoon of the 18th June 1914 a fellow-seaman of the deceased, by name John Cameron, wishing to attend a wedding in Oban that evening, obtained leave from the mate to stop work at 4·30 o'clock in order that he might dress himself and catch the 'Despatch' at 5·30. 14. Before leaving Cameron made an arrangement, which was not unusual in the circumstances, that the deceased John M'Lean should come for him to Oban in a small boat at 10·30 that night, when they would both row back together. 15. M'Lean obtained the loan of a small boat belonging to Messrs John Munro Limited, about 9 feet long, from a friend M'Dougall, one of the employees of John Munro Limited, who had charge of the small boat, in which he (M'Lean) proceeded to Oban, where he landed at the jetty at the west end of the esplanade about ten o'clock. 16. The night was calm and the sea was smooth. 17. M'Lean having some time to wait walked along the esplanade till he met Cameron, when both returned and immediately embarked on board the small boat. 18. Almost immediately before they embarked a warship (a torpedo boat or torpedo-boat destroyer) had passed into Oban Bay, creating a considerable amount of waves. 19. Almost immediately after Cameron and M'Lean had left the shore the boat was swamped and disappeared, leaving the two men struggling in the water, Cameron being ultimately saved by a boat from the warship, while M'Lean was drowned. 20. The said jetty from which the men embarked is distant about 5-8ths of a mile from Munro's slip. 21. The boat which M'Lean hired and in which he met his death, though not an ideal one for the occasion, was yet a reasonably safe one for the purpose for which it was used on a calm night in a calm sea at the height of the summer and manned by two experienced sailors. 22. M'Lean was lawfully absent from the ship with the implied leave of his officers, and in returning to the ship he was in the act of returning to the sphere of his employment, and fulfilling an obligation on his part to be ready to start his work the following morning. 23. The boat so used by M'Lean was a special means of communication necessary to enable the deceased to reach the sphere of his employment, and in using said boat deceased had taken a specific step towards reaching said sphere. 24. The said John M'Lean's average weekly earnings in the employment at the time of his death were 28s. per week. He had been two years and nine months on the 'Lochinvar,' and at the time of his death he was twenty-one years of age. He was besides provided with sleeping accommodation of the value of 3s. 6d. a-week, his total earnings thus amounting to 31s. 6d. per week. 25. The deceased allowed his mother, the respondent, 22s. a-week, but out of this sum he obtained from her an occasional meal valued at 2s. a-week. He thus allowed his mother a nett sum of 20s. a-week. 26. Deceased's sister, who resides with her mother, earns 16s. a-week, and out of this sum she allowed her mother a sum of 2s. a-week.

"On these facts I *found in law*—(1) the deceased met his death by accident in course of and arising out of his employment, (2) the respondent was partially dependent upon deceased, and is entitled to compensation for said death in terms of the Workmen's Compensation Act 1906. I assessed the amount of said compensation at £200 sterling."

The *questions of law* for the opinion of the Court were—"Was I right in finding—(First) that the said deceased John M'Lean met his death by accident arising out of and in the course of his employment with the appellants? and (second) that the respondent is entitled to compensation for said death against the appellants, in terms of the said Workmen's Compensation Act 1906?"

Argued for the appellants—The accident did not occur in the course of the employment. No doubt the view had been expressed in many cases that a seaman's employment was continuous, but in the present case the deceased was not a seaman in continuous employment. He was a tradesman and was not bound to sleep on board. (2) The accident did not arise out of the employment. It was no part of the deceased's duty to bring back wedding guests, and in doing so he acted entirely outwith the scope of his employment—*Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861. Further, the vessel itself was ashore. The gangway cases were quite different, because there the seaman's leave was at an end and he was coming back to his employment. The method of transit could not fix the liability. There was here a confusion between "in the course of the employment" and during the subsistence of the contract of employment. This distinction was supported by *Parker* v. *Owners of s.s. "Black Rock,"* [1915] A.C. 725, which purported to be a résumé of all the preceding cases. Absence from the vessel must be in pursuance of a duty owing to the employers in order to make it an accident arising out of the employment. The cases founded on by the respondent all referred to the appurtenances of a ship (gangway, &c.), which might truly be said to be in the ambit of the sphere of his employment—*Lee* v. *Owners of s.s. "St George,"* 7 B.W.C.C. 85; *Craig* v. *Owners of s.s. "Calabria,"* [1914] S.C. 765, 51 S.L.R. 657. The boat became an appurtenance of the ship when it was the only means of access to the ship. In the present case it was a mere accident as a mode of conveyance to the ship. It had been said further that the doctrine of means of access was not to be extended, and in practice it had been confined to what was physically contiguous to the ship—*Gilbert* v. *Owners of Steam Trawler "Nizam,"* [1910] 2 K.B. 555.

Argued for the respondent—The accident

arose both in the course of and out of the employment. The standing of a seaman relative to continuous employment had been expressly considered in *Moore* v. *Manchester Liners, Limited*, [1910] A.C. 498, 48 S.L.R. 709, which referred to and approved the case of *Robertson* v. *Allan Brothers & Company*, 77 L.J. (K.B.) 1072. In the course of a continuous employment not only all that the workman was commanded to do but all that he was authorised or reasonably entitled to do was within the course of his employment. A seaman was employed generally for the whole period of his engagement apart from particular incidents affecting the ship. Here there had been a general arrangement giving leave, which, however, did not interrupt the employment any more than a cumulative series of short leaves — *Kitchenham* v. *Owners of s.s.* "*Johannesburg*," [1911] 1 K.B. 523, 49 S.L.R. 626. The accident further arose out of the employment. The only access to the ship and yard was by water. The act which the workman here performed was directed to the benefit or service of the master, and that had always been regarded as a canon. But even if the workman had gone on business which was not the business of the ship, the risk was one incidental to his employment and not common to all mankind. This had been recognised as a ratio of distinction in the cases of accidents to seamen—*Kitchenham* v. *Owners of s.s.* "*Johannesbury*," *cit. sup.*; and *Leach* v. *Oakley, Street, & Company*, [1911] 1 K.B. 523. There was in the present case differential exposure to risk—*M'Neice* v. *Singer Sewing Machine Company, Limited*, [1911] S.C. 12, 48 S.L.R. 15; *Macdonald* v. *Owners of s.s.* "*Banana*," [1908] 2 K.B. 926; *Hewitt* v. *Owners of Ship* "*Duchess*," [1910] 1 K.B. 772; *Halvorsen* v. *Salvesen* [1912] S.C. 99, 49 S.L.R. 27; *Richards* v. *Morris*, [1915] 1 K.B. 221.

At advising—

LORD JUSTICE-CLERK—When this case was argued before us it was agreed by the parties that the first question should have been stated, "Was I entitled to find that the deceased John M'Lean met his death by accident arising out of and in the course of his employment with the appellants?" and that no further point was raised in the second question. It was further agreed that, notwithstanding the findings of fact so called in the Stated Case, and particularly findings 22 and 23, the initial statement in the arbitrator's note to the effect that the first question was a question of fact was not correct, but that it really was a question of law which we were entitled and required to determine as a Court of appeal.

The appellants maintained that the arbitrator as matter of law was not entitled to find that the accident arose out of and in the course of the deceased's employment. Unless the respondent prevails upon both points the appellants must succeed.

The arbitrator has found that the deceased John M'Lean was in the act of returning to what the arbitrator calls "the sphere of his employment," but in his note he explains that as M'Lean "met his death while distant over half a mile from the ship" he was "of opinion that on a question of fact he was not within the ambit of the sphere of his employment."

In the case of *Parker* v. *Owners of Black Rock*, [1915] A.C. 725, Lord Sumner observed —"The remaining point that was made was that the accident could be brought within those cases in which a man having gone on shore for his own lawful purposes is returning to his ship and has so nearly approached the means of access to the ship as to make it reasonable to hold that he has returned to the sphere in which his employment operates, and therefore that the accident arises out of the employment. I do not think that this has ever been extended for any great distance. All that we know of this man's death is that it took place by falling off the north pier somewhere between the grocer's shop and the end of the pier where the ship was not, though he thought that she was there. The pier is a quarter of a mile long. Whether or not that long pier was all one means of access to an absent ship I will not say, but I think it is quite clear, as the County Court Judge has found nothing about it, that the argument is unsustainable before your Lordships." Now in the present case I do not think that the small boat used by the deceased was at the time of the accident a means of access to the ship, if indeed it was so at any time. It was a means of transit to the island, but in no sense was it, in my opinion, a means of access, in the sense in which the phrase is used in the cases under the Workmen's Compensation Act, to the ship which was lying hauled up on a repairing slip. The deceased had no doubt taken steps to return to Kerrera, but I do not think he had taken any special step towards getting on board the "Lochinvar"—if indeed such language is appropriate to a ship hauled up on a repairing slip. The risk of being drowned in crossing from the mainland to Kerrera did not, I think, appertain specially to employment on the "Lochinvar." The boat was procured by M'Lean for his own purposes and to enable him to oblige his fellow-employee Cameron, and was not provided by or, so far as appears, with the knowledge of the employers.

The case is, in my opinion, ruled by the decision in *Craig's* case, 1914 S.C. 765. I may also refer to a case which was not cited in the argument before us, namely, *Webber* v. *Wansborough Paper Company, Limited*, [1915] A.C. 51. There Lord Moulton held that the injured workman was entitled to recover "because the accident occurred before he was outside the scope of his employment." Here, I think, the workman's dependant is not entitled to recover because the accident happened while the workman was outside, and before he had returned to, the scope of his employment. I am therefore of opinion that the accident did not arise out of M'Lean's employment. The first question accordingly falls to be answered in the negative, and the second question, as I have explained, does not arise.

LORD DUNDAS—The learned arbitrator has evidently bestowed great pains upon this case, but I do not think that his conclusion can be sustained. My difference from him is not, of course, on any matter of fact — for on the facts the decision of the arbitrator is final—but in regard to the legal inferences which ought to be drawn from the facts stated in the case.

In the view which I take it is not necessary to determine whether or not the accident arose in the course of the employment. I am disposed, upon the authorities, to think that it did, although the findings in fact are not very clearly stated. But as already said there is no need to decide the point, for I consider that upon the facts proved the arbitrator was not entitled to hold that the accident arose out of the employment.

At the time of the accident the deceased man John M'Lean was lawfully absent from the vessel. But I do not think he can be held to have been absent upon the ship's business, or in pursuance of any duty owed to his employers. An argument to the contrary was submitted, upon the view that M'Lean had gone to Oban to bring back a fellow-seaman, Cameron, to the ship. But this was in performance of a private arrangement between the two men, as an obligement by the one to the other; and there is no evidence that the arrangement was assented to by the ship's officers, or was even within their knowledge. The case seems to me therefore to fall directly within the "distinctly workable rule" expressed by Lord Parker, as "the result of the decided cases," in *Parker* v. *Owners of the "Black Rock,"* [1915] A.C., at p. 729, in the following sentences—"It is not sufficient in order to make this an accident arising out of the employment that the accident happened during a period when the man was lawfully absent from the vessel. In order to make it an accident arising out of the employment, the absence from the vessel must be in pursuance of a duty owed to the employer." It is true that in *Parker's* case the noble and learned Lords indicated that the applicant might possibly have succeeded if the findings of the County Court Judge had been such as to warrant an inference that the man, as Lord Sumner put it, having gone ashore for his own lawful purposes, was returning to the ship, and had so nearly approached the means of access to the ship as to make it reasonable to hold that he had returned to the sphere in which his employment operated. But in the case before us there is no room for any such inference. The learned arbitrator states—and it appears to me that the facts amply justify his conclusion—that M'Lean "met his death while distant over half a mile from the ship; and I am of opinion that, on a question of fact, he was not within the ambit of the sphere of his employment." This seems to me to end the matter. The arbitrator, however, reached a conclusion in favour of the applicant upon the ground that M'Lean, having got into a boat at Oban to cross over to Kerrera, "had taken a specific step towards getting on board," and therefore the accident was one arising out of his employment. This view I think will not do at all. The phrase quoted seems to be borrowed from judicial dicta; see *Kitchenham* v. *Owners of s.s.* "*Johannesburg*," 1910, 1 K. B., *per* Fletcher-Moulton, L.J., at p. 527, *affd.* [1911] A.C. 417; *Craig* v. *Owners of s.s.* "*Calabria*," 1914 S.C. 765. But the dicta were used in cases where the accident occurred on the return of a seaman to his ship immediately prior to his actually getting on board—"the critical moment," as Fletcher-Moulton, L.J., put it, "when the dangers to which he is exposed change from being of the one class to being of the other class"; the very class of cases in fact which go to support the arbitrator's conclusion here that the deceased man had not, when the accident occurred, so nearly approached the means of access to the ship as to make it reasonable to hold that he had returned to the sphere of his employment. The question whether or not a man has "taken a specific step towards getting on board" has never been treated as an independent—still less as a conclusive—test of whether or not the accident arose out of his employment.

The learned arbitrator plainly, in my judgment, puts the matter too high when he states, at the outset of his opinion, that the questions whether or not the accident "both arose 'out of' and 'in the course of' his employment are questions purely of fact," falling to be determined by him. But I think further that the arbitrator has fallen into error through unduly sophisticating his mind by a painstaking analysis of decided cases. Even in his findings in fact one discovers precise reproductions of phrases compiled from judicial utterances. For example, findings 22 and 23 are so framed that Mr Moncrieff, with his usual candour, conceded that they cannot be taken as substantive statements of fact, but must be regarded as exegetical of facts contained in the preceding findings. I am afraid that the learned arbitrator has not had sufficiently in view the emphatic and most useful warning expressed by Lord Dunedin in *Plumb's* case, [1914] A.C., at pp. 65-6, where his Lordship appraises the value and the sphere of application of judicial tests and phrases illustrated by the decisions, and points out the dangers of their misuse — "A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority which would have little chance of being accepted if tried by the words of the statute itself."

For these reasons I am of opinion that we should answer the first question, which is not correctly stated, by finding that there was not evidence upon which the arbitrator was entitled to find that the deceased John M'Lean met his death by accident arising out of and in the course of his employment with the appellants. The parties were agreed that the second question is unnecessary and need not be answered.

LORD GUTHRIE—M'Lean being engaged as a seaman—that is to say, in an employment of a continuous nature—I think that the arbitrator was right in holding that the accident in question arose in course of the deceased's employment. But I agree with your Lordships in thinking that the accident did not arise out of his employment. In the absence of any arrangement between him and the ship, M'Lean was at the time on his fellow-employee's business, and not on ship's business. He was not using anything connected with the ship, for the boat which upset did not belong to the ship. It was not as a seaman that he was in the boat, but as a person requiring to use a boat because his destination was an island. When the accident happened he was not in the process of getting on board his vessel, for he had a journey of nearly a mile to make before he could reach the shore near which his vessel had been pulled up on a slip for its annual overhaul. It appears to me that all the cases relied on by the pursuer were "getting on board" cases, as distinguished from merely "returning" cases. What will come within getting on board may in some cases be difficult to decide, but in this case the deceased had not reached the stage of his return journey when occasion arose for getting on board, or making preparations for getting on board, or even for getting on shore before proceeding to get on board the ship. If the arbitrator is right in holding it sufficient that the deceased was on his return to his ship, I do not see how the Court can distinguish between five-eighths of a mile—the distance in this case from the place where the boat upset and the jetty at Kerrera—and five or any number of miles, or between a boat on water, as in this case, and a train or other conveyance on shore. Suppose Cameron and the deceased had waited in Oban and taken the "Despatch" at 5·30 the following morning, as they might have done—the "Despatch" which runs regularly from Oban to Kerrera conveying the workmen of John Munro, Limited—it is clear, as it seems to me, that if the "Despatch" had been upset and the deceased had been drowned, the accident would not have arisen out of his employment. I cannot see any essential difference between that case and the unfortunate accident which happened.

LORD SALVESEN was sitting in the Lands Valuation Court.

The Court answered the first question stated in the case by finding that there was not evidence upon which the arbitrator was entitled to find that the deceased John M'Lean met his death by accident arising out of and in the course of his employment with the appellants, found that the second question did not arise, and recalled the determination of the Sheriff-Substitute as arbitrator.

Counsel for the Appellants—Macmillan, K.C.—Mitchell. Agents—Blair & Cadell, W.S.

Counsel for the Respondent—Moncrieff, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Thursday, January 13.

FIRST DIVISION.

[Lord Anderson, Ordinary.

SIMPSON *v.* GLASGOW CORPORATION AND OTHERS.

Process—Jury Trial—Verdict—Two Defenders—Verdict against Both, but no Evidence against One—Jury Trials Amendment (Scotland) Act 1910 (1 *Geo. V, cap.* 31), *sec.* 2.

A brought an action concluding jointly and severally, or severally, or according to their respective liabilities, against two defenders for damages for personal injury due to their alleged fault, and obtained a verdict against them. There was no evidence of fault on the part of one of the defenders. The case having come up on a rule, the Court *set aside* the verdict *in toto*, holding that it was one and indivisible, and could not be set aside as against the one defender and left standing as against the other, but they *refused* a motion on behalf of the defender against whom there was no evidence, for absolvitor under section 2 of the Jury Trials Amendment (Scotland) Act 1910.

The Jury Trials Amendment Act 1910, sec. 2, enacts—"If after hearing parties upon (*a*) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act 1815 (55 Geo. III, cap. 42), on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and in place of granting a new trial to enter judgment for the party unsuccessful at the trial."

Mrs Helen Miller or Simpson, *pursuer*, brought an action in the Court of Session against the Corporation of Glasgow and also Lyons & Company, Limited, *defenders*, concluding against the defenders conjunctly and severally, or severally, or according to their respective liabilities, for £250 damages.

The pursuer was injured while travelling in one of the tramway cars of the defenders first called, by being thrown violently to the floor of the car. That was caused by the car being suddenly pulled up to avoid a van belonging to the defenders second called, which was crossing the rails in front of the car.

On 16th June 1915 the Lord Ordinary (ANDERSON) approved of an issue in the following terms:—"Whether, on or about 11th November 1914, and at or near a point in Rutherglen Road, Glasgow, near Sandyfauld Street, the pursuer, while travelling in a tramway car belonging to the defenders, the Corporation of the City of Glasgow, was injured in her person through the fault of the defenders, or either and which of them, to her loss, injury, and damage? Damages laid at £250 sterling."