think that the pursuer has set forth a relevant action, and I accordingly dismiss it."

The pursuer appealed to the Second Division of the Court of Session, and argued — *Lawrie* v. *The Magistrates of Aberdeen*, 1911 S.C. 1226, esp. *per* Lord Skerrington, 48 S.L.R. 957, was a direct authority in the pursuer's favour. In that case the dip in the roadway only amounted to 1½ inches, whereas in the present case the unevenness complained of was a hollow 2 inches deep. See also *Blackie* v. *The Magistrates of Leith*, 12 S.L.T. 529, *per* Lord Low. The case should be remitted back to the Sheriff for proof.

The respondents argued — The respondents had a duty to maintain the roadway in a reasonably safe state of repair, but that duty was to be measured by the requirements of vehicular traffic and not of pedestrians. The decision of the Sheriff-Substitute ought to stand.

At advising—

LORD JUSTICE-CLERK — I think the Sheriff-Substitute has gone a little too fast here. While the averments perhaps might have been more specific in some particulars I think they are sufficient to show the particular character of the roadway which is complained of, and I think it would be unsafe to dispose of the case without inquiry. The pursuer very reasonably says that she is willing that the case should be remitted for proof before the Sheriff-Substitute, and I think that is the course we should adopt.

LORD SALVESEN — I agree. The first ground upon which the Sheriff-Substitute proceeds is that the pursuer, while she avers in a general way that the defenders failed to discharge their duty, does not aver what that duty was, nor specifically what their failure of duty was. The Sheriff-Substitute has entirely overlooked the fact that the defenders admit that it is their duty to have the roadway in a reasonably safe condition, and that the pursuer had a right to be where she was. In the face of that admission it would have been quite superfluous on the part of the pursuer to give on record a detailed statement of the various statutes under which the city of Glasgow acquired the management and administration of the streets. Indeed I do not think that is ever necessary unless there is a special defence raised in a statement of facts as to the control of a particular part of the roadway not being vested in the defenders who are sued.

On the other point in the case I think the pursuer has most distinctly averred that this bit of the roadway, on which she was invited to alight, was not safe for foot-passengers, and she has set out the exact locality where she met with her accident, and has said that at that point there was a dangerous depression of two inches. According to a whole series of cases, partly in my own recollection and partly recorded in the books, that appears to me to be quite a sufficient averment to be remitted to proof.

LORD GUTHRIE — I agree. I do not think the Sheriff-Substitute has noted the specialties of the case. He says that the pursuer avers that she stepped into a hollow in the roadway. But she says much more; she alleges that the hollow is two inches below the causeway setts forming the margin of the tramway line. It is also alleged that the place where the hollow existed was the place where a passenger getting out at that particular spot had to descend from the car, and that the stopping-place was rendered dangerous by the presence of the line of granite setts which adjoined the macadamised roadway at a higher level. When one looks at the averments it is plain that whether the pursuer will succeed in making out a case or not she is clearly entitled to an opportunity of proving the averments she has made.

LORD DUNDAS was not present.

The Court recalled the interlocutor of the Sheriff-Substitute and, parties consenting, remitted the cause back to him for proof.

Counsel for the Appellant — Dunbar. Agent—C. Strang Watson, Solicitor, Edinburgh.

Counsel for the Respondents—Lord Advocate (Munro, K.C.)—M. P. Fraser. Agents—Campbell & Smith, S.S.C., Edinburgh.

Friday, December 22.

FIRST DIVISION.

[Sheriff Court at Greenock.

BEATTIE *v.* TOUGH & SONS.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*In the Course of the Employment.*"

A girl and her mate were employed as preparers at a ropework, and were working an intermediate frame. The foreman sent other employees to take charge of the frame. The girl and her mate moved to an adjoining, a finishing, frame. Shortly afterwards, when passing the intermediate frame on her way to see the foreman, the girl noticed on it some manilla threads becoming entwined on the rollers. Without being asked by the employees at the frame she attempted, as was customary and not prohibited, to remove them. Her arm was crushed in the machinery and had to be amputated. *Held* that there was no evidence before the arbitrator on which he could find that the girl injured was disentitled to an award of compensation.

Mary Ann Beattie, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Greenock (WELSH) under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in an arbitration by her against Alexander Tough & Sons, ropemakers, Greenock, *respondents*, appealed by Stated Case.

The Case stated — "1. That for about a

year before the 6th November 1915 the appellant was employed by the respondents as a preparer. 2. That for six weeks before said 6th November the appellant was engaged at an intermediate drawing-frame, and that it is admitted that her wages were 8s. weekly. 3. That frequently, and particularly for some days prior to said 6th November, owing to shortage of water power and irregularity of labour, all the machines could not be kept running, and the girls in the respondents' employment were frequently moved from one machine to another. 4. That on said 6th November the appellant was working at an intermediate drawing-frame along with a girl named Lavina Pollock, two girls being the necessary number to work this machine. 5. That about 11·30 a.m. on said date the water power failed and the machines were stopped for some ten minutes. 6. That shortly before the machines stopped or immediately thereafter two girls named Peaston were sent by the respondents' foreman, who had charge of the distribution of the respondents' employees, to take charge of and work the intermediate drawing-frame at which the appellant and Lavina Pollock were engaged. 7. That the girls who had been sent by the foreman informed the appellant that they were to take charge of and work the intermediate drawing-frame, and that they took possession of the machine and displaced the appellant and the girl Pollock. 8. That the appellant and the girl Pollock left the intermediate drawing-frame and went to a finishing frame next to the intermediate frame at which they had been working and commenced to work there, but that it is not proved that they were ordered to go to this machine by the foreman. 9. That after working for some five minutes at the finishing-frame sorting some 'ends' which were running away the appellant left the machine for the purpose of seeing the foreman with the intention of finding out what definite work she was to do. 10. That while passing the intermediate frame at which she had previously been working, and of which the girls Peaston still had possession and charge and which they were working, the appellant attempted to take out with her right hand some manilla threads which were being entwined round one of the rollers at the 'cans' or front end of the machine, with the result that her right hand was caught between the rollers, and she received injuries which necessitated her right arm being amputated. 11. That it is a habit of the girls in the respondents' employment to remove either 'stoor' forming on the manilla or 'stoor' mixed with manilla threads while the machines are running, and that it is not proved that there is a prohibition against this practice. 12. That the appellant had no duty to interfere with the machine at which she was injured; that she was not requested by the girls Peaston to assist them in their work in any way; and that there was no necessity for her attempting to take out the manilla threads. On the above findings I held that the appellant was not entitled to an award of compensation, being of the opinion that the appellant did not sustain personal injury by accident arising out of and in the course of her employment with the respondents, and I assoilzied the respondents, finding them entitled to expenses."

The *question of law* was—"Was the appellant injured by accident arising out of and in the course of her employment with the respondents?"

To his award the arbitrator appended the following

Note.—"The pursuer, a girl of sixteen years of age, has through the accident lost her right arm, and one sympathises with her in her misfortune. I regret, however, I cannot find her entitled to compensation. It is to my mind clear that from the moment when the girls Peaston, on the foreman's orders, took possession of the intermediate drawing-frame at which the pursuer and the girl Pollock were working, the pursuer's employment at that machine terminated. It is not proved that the pursuer at the moment received any instructions from the foreman that she was to work elsewhere; the weight of evidence is rather to the effect that she received no such instructions. That, however, does not in my view affect the question of the termination of the pursuer's employment at the machine at which the accident occurred. The pursuer and the girl Pollock, it may be observed, recognised that their employment at this machine had ceased, and they departed from it, leaving it in the possession of the girls Peaston. Now it cannot be maintained that the pursuer was at the time of the accident rendering assistance in the working of the intermediate frame, because two girls are the usual and necessary number to attend to a frame of this kind, and at the time of the accident the girls Peaston were at their places and in charge of the machine. No request was made by them to the pursuer to do what she did. This is not a case in which any emergency arose, *e.g.*, *London and Edinburgh Shipping Company* v. *Brown*, 1905, 7 F. 488; nor one in which one workman renders assistance to another in his employer's interest, *e.g.*, *Goslan* v. *James Gillies & Company*, 1907 S.C. 68; *Menzies* v. *M'Quibban*, 1900, 2 F. 732. It is in my opinion the case of an employee doing what at the time was not her own work. What the Lord President said with reference to the facts in the case of *Kerr* v. *William Baird & Company, Limited*, 1911 S.C. 701, seems to me to be applicable to the circumstances of this case—'I think it is quite clear that in this case the accident did not occur while the injured man was performing his ordinary work, but while he was arrogating to himself duties which he was neither engaged nor entitled to perform.' The pursuer was not engaged at the time of the accident to work at the intermediate frame, and she was not entitled to perform any duty thereat. What the pursuer did was in my judgment not within the sphere of her employment at the time when the accident happened, and she cannot therefore recover compensation from the defenders."

Argued for the appellant—The accident was in the course of the employment. What

the appellant did was part of her work, and further it was reasonable in her masters' interest. If she had done what she did while she was working at the intermediate frame the accident would certainly have been in the course of her employment, and the mere fact that she had been removed from that frame when the accident occurred did not make her act outwith the course of her employment. The following cases were referred to:—*Burns* v. *Summerlee Iron Company*, 1913 S.C. 227, 50 S.L.R. 164; *Conway* v. *Pumpherston Oil Company*, 1911 S.C. 660, 48 S.L.R. 632; *Kerr* v. *Baird & Company*, 1911 S.C. 701, 48 S.L.R. 646; *Goslan* v. *Gillies & Company*, 1907 S.C. 68, 44 S.L.R. 71; *Menzies* v. *M'Quibban*, 1900, 2 F. 732, 37 S.L.R. 526.

Argued for the respondents—The arbitrator was right. The appellant had ceased to be employed at the intermediate frame when the accident occurred. The moment the foreman had removed her from that frame any actings of hers with relation to it were outside the course of her employment. Further, the arbitrator had found she had no duty to interfere with that frame. Her act was not reasonable in her masters' interest, for two girls could quite adequately tend the frame—*Goslan*'s case (*cit.*) was distinguished on that ground. The following cases were referred to:—*Herbert* v. *Samuel Fox & Company, Limited*, [1916] 1 A.C. 405; *Andrews* v. *Caledonian Wire Rope Company*, January 5, 1916, N.R.; *Plumb* v. *Cobden Flour Mills Company*, [1914] A.C. 62.

At advising—

LORD JOHNSTON—The question put in this case is, Was the appellant injured by accident arising out of and in the course of her employment? But the true question which we have to determine is whether the learned arbitrator had evidence on which he could competently find that the appellant was not in the course of her employment when injured, and that the accident which caused the injury did not arise out of her employment. He has stated the facts with perspicuous fairness and clearness. He has answered his own question in the negative. In my opinion these facts do not justify in law the conclusion which he has drawn.

Was, then, the injury to the appellant occasioned by accident arising out of and in the course of her employment? The arbitrator has, I think, taken too limited a view of the term "employment." The act which caused the accident was not done in performance of work which was the appellant's special task, yet it was none the less done in the course of her employment in a wider and yet reasonable sense. She was engaged in a ropework and in a department where material was being prepared for ropemaking by a series of machines. She had worked at first as a preparer, and then at an intermediate drawing-frame. Next to this was a finishing-frame. On the morning in question she was working an intermediate drawing-machine along with another girl, Lavina Pollock. The water-power of the factory temporarily failed and the machines stopped. When work was resumed the appellant and Pollock were replaced by two girls Peaston, by instructions of the foreman, but received no orders what they themselves were to do. Without instructions they went to the adjoining finishing-machine, and after "sorting some 'ends' which were running away," appellant left it to search for the foreman in order to get instructions as to what definite work she and Pollock were to turn to. As she passed the end of the intermediate frame at which she had been previously working she noticed some manilla threads twining round one of the rollers and threatening to disturb the even running of the machine, and she attempted to release them while the machine was running, with the result that her right hand was caught between the rollers, and she received injuries which necessitated her right arm being amputated. This was, strictly speaking, not "her business," to use a colloquial term. But the same or similar minor obstructions in the working of the machines were not uncommon. The girls employed at the machines were in the habit of so removing them, and it was not proved that there was any prohibition against the practice, although there well might have been.

The expressions "sphere" and "scope" of employment and other alternatives for the statutory term "course" of employment have been frequently used, but I do not think that they are of any essential aid. The question still is, Was the injury occasioned by accident in the course of the employment? Here the thing done was not in defiance of prohibition. Nor can it be said that the appellant was arrogating to herself a duty which she was not entitled to perform, as in *Kerr* v. *Wm. Baird & Company*, 1911 S.C. 701, 48 S.L.R. 646. Rather, I think, she was doing, imprudently indeed, but not disobediently, a thing not different in kind from what she might have been required or expected to do, and though not able to plead a case of emergency and necessity, still was intervening in attempted furtherance of her employers' interest in the general course of her particular employment, though she was not within the special course of her particular employment, if that is to be held limited to the specific work on which for the time she was, by instructions of her superiors, engaged. I do not like to introduce a new term into this matter. But my meaning may be illustrated by using the word "department." If a clerk sent with a message from the employers' office to the foreman, or if a man employed in the engine-room had done what the appellant did, they would have been stepping out of the department in which they were employed, and could not, in my opinion, have brought themselves within the statute. But the appellant was employed in the department in which the machine in question was worked, and had even been employed in working this very machine. It is therefore, I think, too narrow a view to take to say that she was not at the time

of the accident in the course of her employment.

If she was in the course of her employment, there can be no question that the accident arose out of her employment. In the circumstances of the present case the two things are pretty much the same.

Instead of directly answering the question I would propose that we pronounce a finding that there was no evidence before the learned arbitrator on which he could in law find that the appellant was disentitled to an award of compensation.

LORD GUTHRIE—I am of the same opinion. The arbitrator's twelfth finding is as follows:—[*His Lordship quoted the finding.*]

But that is not an exhaustive statement of the circumstances in which an injured workman may be entitled to recover compensation under the Act. In addition to the three cases of (1) direct order or employment, (2) request by another workman, and (3) necessity or emergency, another category has been recognised, namely, injury received in the course of work, which an employer or his manager might reasonably have required the workman to do, or, had they been present, would be reasonably expected to acquiesce in his doing, the said work being (*a*) for the master's benefit, and (*b*) such as the workman was competent to perform. The case of *Goslan*, 1907 S.C. 68, 44 S.L.R. 71, seems to me in point. That case is rubricked as a case of emergency, but there was no proper emergency. The work in the course of which the deceased was injured was accurately described by Lord M'Laren at p. 71 as "such as a master or overseer might reasonably have required the man in question to perform." This case seems to me *a fortiori* of *Goslan's* case (*cit.*). The operation here was one which fell within the routine of the appellant's regular employment, and in which she had special skill, although at the time of the accident she had no special duty in relation to the particular machine, whereas in *Goslan's* case the deceased was not engaged to do work of the kind he was doing at the time of the accident.

LORD HUNTER—I also think that the learned arbitrator here was not entitled to refuse compensation to the appellant. On the findings in fact which he has pronounced it appears to me that the accident to the appellant arose in the course of her employment, using these words in a reasonable sense. The grounds upon which I am prepared so to hold, and take a different view from the learned arbitrator, have already been stated by your Lordships, and I content myself by expressing my concurrence therein.

The LORD PRESIDENT, LORD MACKENZIE, and LORD SKERRINGTON were absent.

The Court pronounced this interlocutor:

"Find in answer to the question of law in the case that there was no evidence before the arbitrator on which he could in law find that the appellant was disentitled to an award of compensation: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to award compensation to the appellant and to proceed as accords."

Counsel for the Appellant—R. Macgregor Mitchell. Agent—I. M. Pole, Solicitor.

Counsel for the Respondents—Horne, K.C, —MacRobert. Agents—Cadell & Morton, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, November 23.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen.)

PANNIFAX *v.* BROWN.

Justiciary Cases—War—Military Service Act 1916 (5 *and* 6 *Geo. V, cap.* 104), *sec.* 1 (1), *First Schedule*, 1—"*Ordinarily Resident in Great Britain*"—"*Special Purpose*"—*Colonial Subject in Pursuit of Health.*

An Australian, born July 1885, for more than a year prior to August 1914 was, under doctor's orders, travelling on the Continent for his health. He made one visit to London in May 1913, and on the declaration of war he was in France, where it was impossible for him to remain. He came to Scotland, and in September 1914 made a hotel in Edinburgh his headquarters, but, on doctor's orders, he continued to move from place to place, returning always to the Edinburgh hotel. In May 1916 he proposed to return to Australia, and finding a passport necessary, wrote for a birth certificate, which he received in October 1916. In September 1916 he received a notice to report himself for service, but refused compliance. He was passed by a military doctor as fit for service in the army. *Held*, on a stated case, that the Sheriff-Substitute was right in holding that he was "ordinarily resident in Great Britain," and not so "for some special purpose," and consequently came within the scope of the Military Service Act 1916.

The Military Service Act 1916 (5 and 6 Geo. V, cap, 104), enacts—Sec. 1 (1)—"Every male British subject who (*a*) on the 15th day of August 1915 was ordinarily resident in Great Britain and had attained the age of eighteen years and had not attained the age of forty-one years; and (*b*) on the second day of November 1915 was unmarried or was a widower without any child dependent on him, shall, unless he either is within the exceptions set out in the First Schedule to this Act, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours, or in the reserve for the