on its merits, I do not think that it could acquire such quality through the dismissal by the medical referee of the appeal taken to him.

I am of opinion that the questions in the case should each be answered in the affirmative.

The Court answered the first question of law in the negative.

Counsel for the Appellant—Wilton, K.C. —Maclaren. Agent—R. D. C. M'Kechnie, Solicitor.

Counsel for the Respondents—Sandeman, K.C.—T. G. Robertson. Agents— W. & J. Burness, W.S.

Friday, June 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ESPIE *v.* BRITISH BASKET COMPANY 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*"—*Voluntary Action Outwith Ordinary Performance of Duties.*

A boy while employed as an assistant attendant at a circular saw, went into the saw-pit to recover a can belonging to another employee, and while doing so was injured by the saw. In the ordinary performance of his duties he was not required to enter the saw-pit. *Held* that the accident did not arise out of and in the course of his employment—*M'Lauchlan* v. *Anderson*, 1911 S.C. 529, 48 S.L.R. 349, *distinguished.*

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Stated Case—Arbitrator's Note—Competence of Referring to Note.*

Observed per Lord Justice-Clerk that while it was not legitimate for the Court to use statements in the arbitrator's note for the purpose of supplementing the specific findings of fact in the Stated Case, it was legitimate to use the note in order to discover the ratio in law of the arbitrator's judgment.

The British Basket Company Limited, Glasgow, *appellants*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (LEE) at Glasgow granting an application by John Espie junior, residing with his father John Espie, Glasgow, with his father's consent, *respondent.*

The Case stated—"The case was heard before me, and proof led, when the following *facts* were established — (1) That on 2nd December 1919 and for some weeks before said date the respondent was employed as an assistant attendant at a circular saw by the appellants at their works at 250 Crownpoint Road, Glasgow; (2) that the respondent's average weekly earnings in said employment are agreed to have been 12s.; (3) that on the afternoon of 2nd December 1919 the respondent went into the saw-pit, under the saw at which he was employed, to recover a tea can which had been inadvertently dropped into said pit, either by the respondent or by another boy to whom said tea can belonged; (4) that while in said pit the respondent in some way not ascertained brought his head into contact with the circular saw, and thereby sustained an injury as the result of which he has from said date been, and still is, totally incapacitated for work; (5) that said injury has resulted in the respondent's serious and permanent disablement; (6) that while the respondent knew that there was some danger in going into said saw-pit it is not proved that he had been forbidden to do so either by printed notice or by verbal warning; (7) that in the ordinary performance of the duties of the respondent's employment he was never required to enter said saw-pit; (8) that in entering it on the occasion in question he acted foolishly and rashly, but for a purpose which was incidental to his employment; (9) that the said injury was sustained by accident arising out of and in the course of his employment; and (10) that the respondent is under twenty-one years of age.

"I therefore on 30th March 1920 pronounced an award and found that the appellants were liable to the respondent, under the provisions of the Workmen's Compensation Act 1906, in payment of compensation at the rate of 10s. weekly from 2nd December 1919, and so long as he should continue to be totally incapacitated as the result of said injury. I found the appellants liable to the respondent in expenses."

In a *note* appended to his award the arbitrator stated, *inter alia*, as follows—"In my opinion this accident arose out of the pursuer's employment as well as in the course of it. It is true that what directly exposed him to the risk of accident was something outwith the ordinary duties for which he was employed, but it was something within the ordinary and permissible incidents of his day's work. I do not think that the case is distinguishable from *M'Lauchlan* v. *Anderson*, 1911 S.C. 529. The injury in this case, just as in that, arose from a risk to which the workman was exposed by the nature of his work. He was employed at a saw, and was injured by it while doing something reasonably incidental to his employment. Even if he acted in a dangerous and unauthorised manner, the accidental injury arose out of the employment and is one for which he is entitled to be compensated under the Act."

The *question of law* was—"On the evidence could I competently find that the injury sustained by the respondent was by way of accident arising out of and in the course of his employment?"

Argued for the appellants—The accident did not arise out of the employment. A prohibition was not necessary to make the act outwith the boy's duties. If the thing done was dangerous and it was not reasonable for him to do it, then an accident

resulting therefrom did not arise out of the employment—*Brice* v. *Edward Lloyd Limited*, [1909] 2 K.B. 804; *Rose* v. *Morrison & Mason, Limited*, 1911, 4 B. C. C. 277; *Thomson* v. *Flemington Coal Company*, 1911 S.C. 823, 48 S.L.R. 740; *Halvorsen* v. *Salvesen*, 1912 S.C. 99, 49 S.L.R. 27; *Keen* v. *St Clement's Press Limited*, 7 B. C. C. 542, *per* Cozens Hardy, M.R., at p. 545. In the case of *M'Lauchlan* v. *Anderson*, 1911 S.C. 529, 48 S.L.R. 349, founded on by the arbitrator, the risk was clearly incidental to the employment. This applied also to the case of *M'Kinnon* v. *J. & P. Hutchison*, 1916 S.C. (H.L.) 111, 53 S.L.R. 232. The judicial definition of "incidental" to be found in the authorities supported the appellants' argument—*Plumb* v. *Cobden Flour Mills Company Limited*, [1914] A.C. 62, *per* Lord Dunedin at p. 68, 51 S.L.R. 861; *Pope* v. *Hill's Plymouth Company*, 1911, 5 B. C. C. 175, *per* Lord Loreburn at 177; *Craske* v. *Wigan*, [1909] 2 K.B. 635, *per* Cozens Hardy, M.R., at p. 638; *Barnes* v. *Nunnery Colliery Company Limited*, [1912] A.C. 44, *per* Lord Atkinson at p. 49, 49 S.L.R. 688; *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 352, *per* Lord Sumner at p. 372, 55 S.L.R. 509.

Argued for the respondent—The accident was incidental to the employment—*Keyser* v. *Burdick & Company*, 1910, 4 B. C. C. 87; *Kearon* v. *Kearon*, 1911, 4 B. C. C. 435; *Keenan* v. *Flemington Coal Company Limited*, 1902, 5 F. 164, 40 S.L.R. 144. It was a reasonable act for the workman to do what he did—*Edmund* v. *s.s. Peterston (Owners of)*, 1911, 5 B. C. C. 157; *Beattie* v. *Tough & Sons*, 1917 S.C. 199, 54 S.L.R. 127.

LORD JUSTICE-CLERK (SCOTT DICKSON)—We have had the usual copious citation of authorities, but these, so far as I am concerned, do not afford much assistance.

In the present case the arbitrator has pronounced certain findings in fact some of which are not truly of that character. One of these findings—the 8th— is in the following terms:—"That in entering it" (the saw-pit) "on the occasion in question he acted foolishly and rashly, but for a purpose which was incidental to his employment." I presume that if the last clause of that finding had stated a pure question of fact it would be impossible for us to interfere with the result at which the arbitrator has arrived. But then under our Act of Sederunt the arbitrator has added a note explaining the ground of his judgment. I do not think it is legitimate for us to use statements in the note for the purpose of supplementing the specific findings in fact which are contained in the Stated Case; but I think it is legitimate for us to use the note in order to discover the ratio in law of the arbitrator's judgment.

That legal ground in my opinion appears quite distinctly from the last paragraph of the note, where the arbitrator says—"I do not think that the case is distinguishable from *M'Lauchlan* v. *Anderson*, 1911 S.C. 529." As I read the note I think that but for the view he took of that case the arbitrator would not have reached the conclusion that he did. When I look at *M'Lauchlan* v. *Anderson* it appears to me that it has no analogy so far as any material factor is concerned. The only analogy between the two cases is that in each of them a trivial article was dropped and that in the course of recovering it the accident took place. But in all material respects they are totally different. Therefore, on the ground that the arbitrator misunderstood and misapplied the case of *M'Lauchlan*, and that, proceeding on a wrong view of that case he reached an erroneous conclusion, we ought, I think, to decide that he was not justified in finding that the injury sustained by the respondent was caused by an accident arising out of and the course of his employment. I accordingly propose that we should answer the question in the negative.

LORD DUNDAS—I am of the same opinion. I think the learned arbitrator has misdirected himself. He says—"I do not think that the case is distinguishable from *M'Lauchlan* v. *Anderson*, 1911 S.C. 529." I cannot share that view. In giving judgment in that case Lord President Dunedin quoted the words of Lord Loreburn in the case of *Moore* v. *Manchester Liners*, 1910 A.C. 498, at p. 500, to this effect—"I think an accident befalls a man 'in the course of' his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing." Lord Dunedin continues—"Now this man's operation of getting down from the waggon to recover his pipe seems to me to satisfy all these conditions"; and he goes on to explain how that was. I do not think that any such application of Lord Loreburn's words can be made in the present case. This boy was not doing what a boy, employed as this boy was, might reasonably be doing during his employment at a place where he might reasonably be during that time to do that thing. In *M'Lauchlan's* case the man, as the Court held, was entitled to be upon the waggon. Now here the 7th finding is—"That in the ordinary performance of the duties of the respondent's employment he was never required to enter said saw-pit." The fact that, as mentioned in the 6th finding, it is not proved that he had been forbidden to go there, has not, in my opinion, much bearing upon the question. To put it in common parlance, the boy had no business to be in the saw-pit at all. It was a dangerous place. It is explained in the 3rd finding that he had gone into the saw-pit, under the saw, to recover a tea can which had been inadvertently dropped into the pit either by the respondent or by another boy to whom the tea can belonged.

In these circumstances it seems to me impossible to say that what he was doing was in any sense incidental to his employment, or was in any way connected with his duties. Accordingly, like your lordship, I am of opinion that the accident cannot be said to have arisen out of and

in the course of his employment. I doubt very much whether it arose in the course of the employment, but to my mind it certainly did not arise out of the employment. We had the usual citation of authority, but I do not think that any of the cases quoted to us justify the conclusion arrived at by the learned arbitrator.

I should only like to add that in my view the latter half of the 8th finding and the whole of the 9th should not have been included by the arbitrator among the facts which were established. The latter part of the 8th finding is that the boy acted for a purpose which was incidental to his employment. That is not a finding of fact. Still less is the 9th finding "That the said injury was sustained by accident arising out of and in the course of his employment." If that were a finding in fact it would of course be conclusive. But it has been pointed out again and again that a finding in that form is not a finding of fact but either of law or of mixed fact and law; and for that one need go no further than to the opinion of Lord Kinnear in the case of *M'Lauchlan*, on which the learned arbitrator relies.

On the whole matter I think we must answer the question in the negative, for the reasons which your lordship has stated.

LORD SALVESEN—I agree, and I associate myself with what Lord Dundas has said with regard to the last half of the 8th and the whole of the 9th findings, which are clearly not findings in fact and must be treated as findings in law.

This is a very plain case. Mr Macdonald argued, as I understood him, that whatever a boy may naturally do during working hours in or near his employers' premises must be taken to be reasonably incidental to his employment. I cannot affirm anything of that description, and I think there is no authority to support such a proposition. Boys will naturally incur unnecessary risks, boys will naturally be mischievous, but to say that whatever unnecessary risks a boy incurs, for his own purpose or to oblige another boy, makes the act incidental to his employment, although totally unconnected with it, seems to me to affirm what on the face of it is an untenable proposition.

According to the findings in fact of the learned arbitrator this boy went down into a saw-pit where he had no business whatever to go. The learned arbitrator is unable to say whether at the time the boy went down the pit the circular saw was revolving or not, and we must therefore take it that it may have been revolving at the time the boy descended. Even if it were not revolving, the boy knew perfectly well that it might be set in motion, and to go down the pit in order to get his friend's tea can which had fallen into the pit seems to me to be absolutely without connection with his employment. He incurred, in my opinion, a risk unconnected with his employment for a purpose of his own in which the employer had no interest. Regrettable as the accident was, I think it is impossible to say that it comes within the scope of the Workmen's Compensation Act.

LORD ORMIDALE—I entirely agree with the opinions which your Lordships have delivered. The only difficulty I felt at the start of the case was in deciding the case in the event of our having to treat findings 8 and 9 as truly findings in fact. For the reasons stated by your Lordships I entirely agree that they are not findings in fact. No. 8 is a finding of mixed fact and law, and No. 9 is a finding entirely of law. These so called findings in fact being out of the way, it appears to me that the 7th finding in fact is conclusive in this case, because by that finding in fact it is ascertained that in the ordinary performance of the duties of the respondent's employment he was never required to enter the saw-pit, or, as the arbitrator phrases it in his note, it was outwith his ordinary duties to enter the saw-pit.

What he did might have been excused had he entered the saw-pit for some purpose connected with his employment. But he did not. He entered it to recover this tin tea can—an act which had no connection whatever with his employment. Therefore I do not think that what he did was reasonably incidental to his employment, especially when one takes into consideration the additional fact that in entering the saw-pit as he did the respondent had to face a peril which he would not in the ordinary course of his employment have had to encounter, and that he knew that it was a dangerous place to enter. Accordingly I agree with your Lordships that the question must be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the Appellants—MacRobert, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent—Wilton, K.C. —Macdonald. Agents—Robert White & Company, S.S.C.

HOUSE OF LORDS.

Friday, June 18.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

STEWART *v*, MACLAREN AND ANOTHER.

(In the Court of Session, November 12, 1919, 57 S.L.R. 66.)

Succession — Testamentary Writings — Revocation — Third Codicil Repeating Provisions of Second save One, and Expressly Confirming Will and First Codicil.

A testatrix left a will and three codicils. The third codicil, which was notarially executed, repeated the provisions of the second codicil with the exception of one,