think that this privilege would have been given expressly, and not in the obscure and circuitous mode in which the appellants conceive it has come to them. And the determining consideration, as it seems to me, is that, as already observed, the liability to assessment which the appellants seek to avoid is not a liability directly imposed by Schedule D itself, but is the fruit of a joint operation on their case of Schedule B which imposes on them liability and of their choice to have that liability measured in a particular way — that is to say, through their profits and gains from the occupation of the land being *deemed to be* profits and gains of a trade chargeable under Schedule D.

From an application of the views above expressed it follows (1) that the respondent is wrong in his contention that the appellants are not entitled to elect, and (2) that the effect of their election is not to procure them exemption but to make them assessable as under Schedule D in respect of their profits and gains as occupants of the lands in the same way as any ordinary occupant who makes such an election.

The Court reversed the determination of the Commissioners and remitted to them to sustain the appeal.

Counsel for the Appellants — Watson, K.C.—W. H. Stevenson. Agents—Robson, M'Lean & Paterson, W.S.

Counsel for Respondent—The Lord Advocate (Morison, K.C.) — R. C. Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Saturday, January 15.

SECOND DIVISION.

[Sheriff Court at Airdrie.

BROWN *v.* BATON COLLIERY COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of and in the Course of the Employment — "Added Peril."*

A workman's appointment as an assistant electrician at a colliery carried with it the duty of removing dirt from a gate-end box, but in order to do so it was his duty antecedently to switch off the current by taking out a fuse at the pit bottom so as to prevent his hands coming in contact with live wire. Each afternoon the current was switched off for certain purposes at the surface of the pit and outwith the control of the workman, the time during which it was off not being fixed or calculable but variable. On the day in question the workman, observing that the current had been switched off, and seizing what he conceived to be an opportunity of cleaning the box, proceeded to remove the dirt. At that moment the current was again switched on and his hands were severely burned. The workman had not been forbidden to do any part of his work in any particular way, but he knew the correct way of performing the operation, and knew that he was taking a very grave risk. *Held* that the accident did not arise out of his employment, in respect that it was due to an "added peril" voluntarily superinduced by the workman himself, and not reasonably incidental to his employment.

William Brown, apprentice electrician, Dykehead, Shotts, *appellant*, being dissatisfied with an award of the Sheriff-Substitute at Airdrie (MACDIARMID) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by him against the Baton Colliery Company, Limited, Dykehead, Shotts, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the Sheriff as arbitrator is asked to award the pursuer and appellant compensation in terms of the Workmen's Compensation Act 1906, and War Additions Acts 1917 and 1919, and with expenses.

"The following *facts* were admitted or proved:—(1) That on 27th October 1919 the pursuer and appellant, who is nineteen years of age and an apprentice electrician, was injured by accident while employed by the defenders and respondents and working in their Baton Colliery, Dykehead, Shotts. (2) That at the date of said accident the pursuer and appellant was working in said pit as an assistant electrician, having been duly appointed by the manager, conform to certificate dated 20th February 1919 in the following terms:—'Coal Mines Act 1911.—Baton Colliery, 20th February 1919.—William Brown is hereby appointed to examine and repair electrical apparatus.—Signed, Ed. Somerville, Manager. I hereby accept the above-mentioned appointment.—Signed, William W. Brown'; and that he and John Stevenson, also duly appointed, were responsible under the chief electrical engineer for the examination and repair mentioned in said certificate. (3) That the said accident occurred as follows:—Stevenson and the pursuer and appellant had on the day in question, in allocating the work to be done between them, arranged that the pursuer and appellant should proceed to the gate-end box in the Smithy Coal Section for the purpose of pulling a negative earthing wire around said box. For this job it was not necessary that the electric current should be switched off. The pursuer and appellant proceeded to said box and duly completed the job. At three o'clock each afternoon the electric current in said pit was switched off in order that the load might be transferred from two generators to one, and this operation was performed on the surface of the pit and outwith the control of the pursuer and appellant, the time during which the current was off not being fixed and calculable but variable. At three o'clock on the said day the pursuer and appellant, who had completed the job above referred to, had shut the gate-end box, and was gathering up his tools preparatory to departure, observed

from the stopping of an electric pump that the current was off for the purpose of transferring the load. While he had been at work pulling the earthing wire round the box he had noticed dirt in the box, and seizing what he conceived to be an opportunity of removing the dirt, he when he observed that the pump had ceased to work reopened the box and proceeded to attempt to remove the dirt, and the current being at that moment switched on, his hands were very severely burned by contact with live wire. (4) That it is agreed between parties that the pursuer's and appellant's appointment 'to examine and repair electrical apparatus' carried with it the duty to remove dirt from a gate-end box. (5) That the dirt in gate-end boxes was generally removed at specific times—that is to say, when extensions were put on the cable, an operation performed at regular intervals, and for which the electric current was switched off—but that it was not unknown for dirt so to be removed when any repair was being done, but never without the current being switched off for that purpose. (6) That the dirt which the pursuer and appellant attempted to remove from said gate-end box could not have been removed without the workman's hands coming in contact with live wire unless the current had first been switched off, and that the pursuer and appellant had never seen anyone attempt, nor had he ever attempted, to remove dirt from a gate-end box when the current was on. (7) That for the discharge of his duties of examination, repair, and cleaning, the pursuer and appellant was entitled, if he deemed it necessary, to take off the electric current, and that this was done by the removal of a fuse at the pit bottom (some 600 yards distant from the gate-end box in question), the electrician who removed the fuse bearing it away with him so that he might keep control of the current. (8) That on the day in question there was no immediate necessity for the removal of the said dirt from said box, and that the pursuer and appellant himself says that he attempted to remove it, when he noticed that the current was off, as above-mentioned, because 'We like to keep things clean.' (9) That the pursuer and appellant had not been given instructions, either written or verbal, forbidding him to do any part of his work in any particular way, but that he knew the correct way in which to go about it, and in especial he was well aware that he could not remove the dirt he attempted to remove were the electric current on. (10) That in attempting to remove dirt, as above set forth, the pursuer and appellant was obviously taking, and knew that he was taking, a very grave risk, more especially as he had no control over the current at the time, and knew that the time during which it would be off was not a fixed but a variable time, and that the taking off and putting on thereof might be, as it was in this instance, practically instantaneous.

"In these circumstances I found that the said accident did not arise out of the employment, and refused the crave of the petition and dismissed the same: Found the pursuer and appellant liable to the defenders and respondents in expenses."

The *question of law* was—"On the above facts was I entitled to find that the accident did not arise out of the employment?"

The Sheriff-Substitute's *note* was—"There appears to me to be little doubt as to the conclusion to be drawn from the facts, and they are really not in dispute between parties. The question, as it appears to me, is—Was the undoubtedly grave risk taken by this workman a risk reasonably incidental to his employment? I cannot think that it was. The workman was employed as an assistant electrician, and admittedly one of his duties was to keep the apparatus, which he had been appointed to examine and repair, clean. His contract of service further implied, as I think, that he should do his work in a reasonable manner. There was no question of prohibition, that is to say, certain acts were not permitted while others were expressly forbidden. Among the duties of cleaning was that of removing dirt from gate-end boxes, and he knew the time at which, and the method in which, that work ought to have been performed. Especially is it relevant to the circumstances here to note that he knew that he could not remove the dirt from this gate-end box while the electric current was on. I do not suppose that it could be maintained that he would have been taking a risk incidental to his employment had he when the current was on attempted to remove the dirt in question. In a sense he would not then have been taking a risk at all. He would have been courting the absolute certainty of injury from contact with live wire. The case here is not so extreme, but it appears to me to come very near it. Here the workman assumed that he would have time while the current, over which he had at the moment no control, was off, to remove the dirt; he knew that if he was wrong in his assumption his hands would come in contact with live wire; he could not calculate, and knew he could not calculate, on a definite period during which the current would be off; there was no necessity to do the work at the moment—in doing it he was not furthering his employers' interests in any way—the dirt was not impeding the working of the electrical apparatus in any way; there was a proper way and a proper time for removing the dirt; and lastly, what seems to me to be a crucial fact, he knew that it was physically impossible for him to remove the dirt in question when the current was on without coming in contact with live wire. What reason induced him to take the risk he did is not disclosed by the evidence, nor does it appear to me greatly to matter. The fact is that he did take the risk, that is to say, the risk of contact with live wire. But how can it be said in the circumstances that this risk was incidental to his employment? In my opinion it was not, but was a risk which the workman went out of his way to, so to speak, create. I daresay it may well be that there are risks involved in the work of an electrical engineer, but this risk was, as I think, neither involved in the ordinary

nor the extraordinary performance of the workman's duties. It was, in short, an added peril."

The appellant argued that the accident arose out of the employment and cited the following cases:—*Moore & Company* v. *Donnelly*, 1920, 58 S.L.R. 85; *Blair & Company, Limited* v. *Chilton*, 1915, 8 B.W.C.C. 324; *Bourton* v. *Beauchamp*, 1920 A.C. 1001, *per* Viscount Cave at 1006; *Rossiter* v. *Commissioners of Port of Waterford*, 1920, 2 Ir. Rep. 172, *per* Sir James Campbell, C., at 175; *Foulkes* v. *Roberts*, 1919, 12 B.W.C.C. 370; *Lancashire and Yorkshire Railway* v. *Highley*, [1917] A.C. 352, *per* Viscount Haldane at 360, Lord Dunedin at 365, and Lord Sumner at 373; *Beattie* v. *Tough & Sons*, 1917 S.C. 199, 54 S.L.R. 127; *Bullworthy* v. *Glanfield*, 1914, 7 B.W.C.C. 191; *Smith* v. *Fife Coal Company, Limited*, 1913 S.C. 662, 50 S.L.R. 455, 1914 S.C. (H.L.) 40, 51 S.L.R. 496; *M'William* v. *Great North of Scotland Railway Company*, 1914 S.C. 453, 51 S.L.R. 414; *Plumb* v. *Cobden Flour Mills Company, Limited*, 1914 A.C. 62, *per* Lord Dunedin at 67; *Fraser* v. *Riddell & Company*, 1914 S.C. 125, 51 S.L.R. 110; *Mawdsley* v. *West Leigh Colliery Company, Limited*, 1911, 5 B.W.C.C. 80; *Barnes* v. *Nunnery Colliery Company, Limited*, 1912 [A.C.] 44; *Conway* v. *Pumpherston Oil Company, Limited*, 1911 S.C. 660, 48 S.L.R. 632; *Whitehead* v. *Reader*, [1901] 2 K.B. 48, *per* Collins, L.J., at 51. [Lord Dundas referred to *Harding* v. *Brynddu Colliery Company, Limited*, [1911] 2 K.B. 747].

The respondents argued that the accident did not arise out of the employment and cited the following cases:—*Moore & Company* v. *Donnelly*, *cit.*, *per* Lord Atkinson at 91; *Lancashire and Yorkshire Railway* v. *Highley*, *cit.*, *per* Lord Haldane at 360 and 361, and Lord Sumner at 372; *Fraser* v. *Lochgelly Iron and Coal Company, Limited*, 1920, 2 S.L.T. 147; *Russell* v. *Murray (A. G.) Limited*, 1915, 9 B.W.C.C. 81; *Plumb* v. *Cobden Flour Mills Company, Limited*, *cit.*; *M'Diarmid* v. *Ogilvy Brothers*, 1913 S.C. 1103, 50 S.L.R. 883.

At advising—

LORD JUSTICE-CLERK — The arbitrator decided against the appellant on the ground that the accident was due to an added peril introduced by the appellant himself and not reasonably incidental to his employment, and he accordingly held that the accident did not arise out of the employment. The doctrine of added peril has been more fully developed in some of the most recent cases. It is to a large extent, if not fundamentally, a matter of fact, but it has now been brought within limits which have been tolerably well defined by authoritative pronouncements. In the case of *Plumb* ([1914] A.C. 62) Lord Dunedin, delivering the considered judgment of the House of Lords, put the matter thus—". . . The question of within or without the sphere is not the only convenient test. There are others which are more directly useful to certain classes of circumstances. One of these has been frequently phrased interrogatively. Was the risk one reasonably incidental to the employment? And the question may be further amplified according as we consider what the workman must prove to show that a risk was an employment risk, or what the employer must prove to show it was not an employment risk." Then after dealing with what he calls "the first branch" he proceeds thus —"As regards the second branch a risk is not incidental to the employment when either it is not due to the nature of the employment or when it is an added peril due to the conduct of the servant himself." In either case whether the risk is "not due to the nature of the employment" or "is an added peril due to the conduct of the servant himself" the result is the same—the risk is not incidental to the employment.

In the later case of *Highley* ([1917] A.C. 352) Lord Haldane considering the same question expressed himself thus (at p. 360)—"In doing what he did in crossing the line by going under the trucks without ascertaining whether the train might not begin to move, was the workman arrogating to himself a title to do something he was neither engaged nor entitled to perform? This is one of the tests prescribed in the judgment of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company*, and I think it is the test which should be applied in the present case. It explains the meaning of the phrase which is often used—'added peril'—as meaning a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself." Later on he adds (at p. 361)—"The workman could easily have got the hot water he wanted without taking the altogether unnecessary peril of passing between the trucks, and I can decern no evidence which would justify a finding that this peril was other than an independent one which he added quite superfluously and entirely of his own initiative. It was accordingly not a case in which, as the Court of Appeal seems to have thought, he was doing what was within the sphere of his employment merely in a wrong way." In the same case Lord Dunedin concludes his judgment thus (at p. 365)—"The lines might be crossed at any point. They were free to be crossed on this occasion if the man had deviated five truck lengths to the right. Instead of that he ducked under the couplings of a set of trucks, not in a proper siding or lye but on the regular goods running line, without taking the trouble to see if there was an engine attached. In doing so, in my judgment, he clearly added a peril to his employment to which the employer had given no sanction, with the result that the ensuing accident was not an accident arising out of his employment." Similarly Lord Atkinson, referring to the judgment of Farwell, L.J., in *Gane's* case ([1909] 2 K.B. 539) said (at p. 371)—"It will be observed that the learned Lord Justice put unreasonable acts and forbidden acts on the same level, each lying outside the sphere of the workman's employment." Finally, Lord Sumner in a passage which has since been more than once judicially referred to and approved summed up the matter in the first para-

graph of his judgment, on p. 372, to which I refer without quoting it at length. His Lordship seems to me there to treat the addition of an extraneous peril of the workman's own making as effectually taking him outside the scope of his employment.

On the facts of the present case the arbitrator has found that the appellant went to do a particular job, for the doing of which it was not necessary that the electric current should be switched off. This job was "duly completed." But the appellant then observed that the current had been switched off by some other workman not under the control of the appellant for a time the length of which did not in any way depend on the appellant—a time which was not fixed or calculable but variable, and might be, and in fact in this instance was, practically only momentary, the taking off and putting on the current being practically instantaneous. It was within the appellant's employment to remove dirt from the gate-end box, but in order to do that it was his duty antecedently to switch off the current, otherwise his hands, while he was engaged in removing the dirt, would certainly come in contact with live wire, which was exactly what happened here. When dirt was to be removed from the gate-end box the electrician who was about to remove the dirt first removed the fuse from the pit bottom, which cut off the current from the wires within the gate-end box, and, moreover, he took the fuse away with him so that he might keep control of the current. That was always done when dirt was being removed from the gate-end box, and it was the proper method of taking off the current when that was required for the performance of any of the appellant's duties. The appellant did not do that but resolved to "risk it," and to remove the dirt without removing the fuse, so that he had no control of the current and no knowledge as to how or when some other workman entirely beyond his control might turn the current on again.

I think the arbitrator quite correctly finds as facts—"(10) That in attempting to remove dirt, as above set forth, the appellant was obviously taking, and knew that he was taking, a very grave risk, more especially as he had no control over the current at the time and knew that the time during which it would be off was not a fixed but a variable time, and that the taking off and putting on thereof might be as it was in this instance practically instantaneous." These are findings in fact and were in no way challenged in the argument before us. In my opinion we are not entitled to disregard these findings. I think the arbitrator has found as a fact that there was an added peril ultroneously introduced by the appellant himself, not reasonably incidental to his employment, and that the appellant thereby subjected himself to a hazard which it was no part of his employment to undertake. In my opinion it does not affect the result that the appellant's object was to remove dirt from the gate-end box. There was a well-recognised method of doing that—what the arbitrator calls "the correct way." The appellant chose to adopt another method which involved a very great risk, and which added risk in fact caused the accident and injury. In so doing, the appellant, in my opinion, went out of his employment. I am of opinion that the question put to us ought to be answered in the affirmative.

LORD DUNDAS — Upon the facts here stated the learned arbitrator was, in my judgment, entitled to find — and indeed, rightly found — that this accident did not arise out of the workman's employment. These facts are fully and clearly set out in the case. The appellant's duties did, no doubt, include that of removing dirt from this box. But he well knew the proper times at which, and the proper method in which, this should be done. These conditions he neglected on the occasion in question, and attempted to clean out the box without having seen to it that the electric current was duly under his own control by removing the switch.

In these circumstances can the accident be said to have arisen out of the employment? I think not. The learned arbitrator — rightly in my judgment — has regarded the case as one of "an added peril." If one applies to the circumstances of this case the language of Lord Atkinson in his often-quoted judgment in *Barnes* ([1912] A.C. 44, at p. 50) it seems to me that the appellant was injured "through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment." Brown's service entailed, no doubt, the removal of dirt from the box when that was needful, but he voluntarily added a peril, for which there was no need, and which he was in no way obliged or even authorised to encounter, when he chose to thrust his arm into the box at a time when, although the current was off at the moment, he knew that at any instant it might be turned on again apart from any act or volition of his own, as in fact happened. The same result would, I think, be reached if one applied any of the other "tests," as they have been called, which judges have from time to time resorted to in cases of this sort. For the truth is that these tests are, if I may so phrase it, merely different facets cut upon the same stone; different modes of solving the same fundamental problem—did the accident in question arise out of the employment? This view, perhaps trite enough, is, I think, happily illustrated by a passage in Lord Haldane's opinion in *Highley's* case ([1917] A.C. 352). The rash act there done by the workman was not at all dissimilar to that now before us. He had ultroneously placed himself under the wheels of a truck which, though at the moment stationary, were liable at any instant to begin to move; they did so, and the accident occurred. Lord Haldane said (p. 360)—"In doing what he did in crossing the line by going under the trucks without ascertaining whether the train might not begin to move, was the workman arrogating to himself a title to

do something he was neither engaged nor entitled to perform? This is one of the tests prescribed in the judgment of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company* ([1914] A.C. 62), and I think it is the test which should be applied in the present case. It explains the meaning of the phrase which is often used, 'added peril,' as meaning a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself."

It seems to me that, whatever test one applies to this case, the appellant must fail. In my judgment, in acting as he did, he voluntarily created and incurred a new and added peril; he took upon himself to do something he was not employed or entitled to do; he performed an act which it was no part of his duty to hazard, and which was not reasonably incidental to his employment; he ultroneously proceeded outwith the sphere of his employment. I reach, having regard to the decided cases, the conclusion at which I should have arrived, in the absence of any authority, upon the very words of the statute, viz., that this accident was not one arising out of the employment.

We must, therefore, in my judgment, answer the question put to us in the affirmative.

LORD ORMIDALE—The appellant met with an accident on 27th October 1919 when working in the Baton Colliery as an assistant electrician. On the day in question he had been engaged in pulling a negative earthing wire round a gate-end box in the Smithy Coal Section of the pit. For the execution of this piece of work it was not necessary that the electric current should be switched off. After completing this job and closing the gate-end box he noticed from the stopping of an electric pump that the current was off. This was for the purpose of transferring the load from two generators to one, an operation which took place every afternoon. On observing that the pump had ceased to work, the appellant re-opened the box and proceeded to attempt to remove some dirt from it, and the current being at that moment switched on again, his hands were severely burned by contact with live wire. The question is whether this accident arose out of the appellant's employment. The Sheriff has found on the facts stated by him that it did not. In my opinion he was entitled so to find.

The appellant's appointment was to examine and repair electrical apparatus, and it is agreed that that carried with it the duty to remove dirt from a gate-end box, and it is not suggested that in attempting to remove the dirt when he did the appellant was actuated by any desire to suit his own convenience or to serve any personal purpose. It was maintained therefore that while he may have been careless or may have committed an error of judgment in the performance of his duty, the accident which befell him none the less arose out of his employment. Many cases were cited. I have considered them but do not propose to examine them. I shall only say that those which appear to me most helpful as guides towards applying the law to what I regard as the very special circumstances of the present case are *Barnes* v. *Nunnery Colliery Company*, [1912] A.C. 44, and *Lancashire and Yorkshire Railway Company* v. *Highley*, [1917] A.C. 353. On the facts found by the Sheriff-Substitute, the accident, in my opinion, did not arise out of the appellant's employment "but was caused by an added peril to which the deceased by his own conduct exposed himself, and not by any peril involved by his contract of service."

The salient facts are these—that the dirt which the appellant attempted to remove could not have been removed without the workman's hands coming in contact with live wire unless the current had first been switched off, and the appellant knew this; that for the discharge of his duties the appellant was entitled to take off the electric current in such a way as to give him control of the current until his work of removing the dirt was concluded; that he knew the correct way to go about it; and that there was no urgency about removing the dirt in question. Further, that when the load is transferred from two generators to one, the operation is performed on the surface of the pit and outwith the control of the appellant, and that the time for which the current may be off is not fixed or calculable but variable. The 10th finding is in my opinion all-important, and I quote it—"That in attempting to remove dirt as above set forth the pursuer and appellant was obviously taking, and knew that he was taking, a very grave risk, more especially as he had no control over the current at the time and knew that the time during which it would be off was not a fixed but a variable time, and that the taking off and putting on thereof might be, as it was in this instance, practically instantaneous." In the whole circumstances it seems to me that following the course of his employment the appellant had not to hazard the peril of encountering live wire. It was his own ultroneous act which created this risk. That was an "added peril," *i.e.*, "a peril voluntarily superinduced on what arose out of the employment to which the workman was neither required nor had authority to expose himself," to use the words of Lord Haldane in *Highley's* case, [1917] A.C., at p. 361.

I agree that the question of law should be answered in the affirmative.

LORD SALVESEN did not hear the case.

The Court answered the question of law in the affirmative, affirmed the determination of the Sheriff-Substitute as arbitrator, and dismissed the appeal.

Counsel for the Appellant—Fraser, K.C. —Duffes. Agent—W. Carter Rutherford, S.S.C.

Counsel for the Respondents—Graham Robertson — Marshall. Agents — W. B. Rankin & Nimmo, W.S.