preting the words "occupier as tenant," I think we may derive aid from the opinions of our predecessors in the class of cases to which I have referred. I think it is not immaterial to observe that the law had been quite settled to the effect I have stated by a series of decisions before the Act of 1884 was passed, and if the Legislature had intended to alter it the qualification of 1868 would not have been re-enacted in terms.

It was maintained, however, that the claim was supported by the 9th and 34th sections of the Crofters Holding Act 1886. I do not think that statute aids the claimant's case. It gives a cottar who has no lease a right to compensation on removal in certain circumstances. But it does not give him any new right as regards tenure, and, on the contrary, assumes the landlord's right to remove him, and, so far as expression goes, it carefully distinguishes between the case of a tenant and the case of a cottar who has not a lease. If it be referred to as an aid to construction I think it tells against the claim.

LORD KINCAIRNEY concurred.

LORD KINNEAR intimated that Lord Trayner, who was absent at the advising, had read the opinion delivered by him, and concurred therein.

The Court dismissed the appeal.

Counsel for the Appellant—W. L. Mackenzie. Agents—Clark & Macdonald, S.S.C.

Counsel for the Respondents — C. N. Johnston. Agents—Russell & Dunlop, C.S.

COURT OF SESSION.

Tuesday, December 13.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

DURHAM *v.* BROWN BROTHERS & COMPANY, LIMITED.

Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37.), *sec.* 1 (1)—*Accident "Arising out of and in the Course of Employment" -Stated Case—Question of Law.*

The Workmen's Compensation Act 1897 provides by section 1 (1) that in the case of personal injury to a workman by accident "arising out of and in the course of the employment," the employer is liable to pay compensation. There is a provision for referring questions as to compensation to arbitration in the Sheriff Court, and the Sheriff may be required by either party to state a case "on any question of law determined by him" for decision by the Court of Session.

In an arbitration between the representatives of a deceased workman and his employer, the Sheriff, as arbitrator, found that the injuries causing the workman's death were not caused by "accident arising out of and in the course of the employment," and that the claim could not be maintained. In a case stated by the Sheriff the following facts were set forth—The deceased workman D was employed by the respondents in their engineering works as a boilermaker's assistant, and it was his duty to assist another workman, J, in any work in which the latter might be engaged. Close to the place where they were working were two furnaces, above which was a tank containing water. As they observed the tank to be leaking, J went up to the tank to examine what was wrong, using an iron ladder, which was the proper means of access. D, without receiving any directions from J, endeavoured to reach the tank for the same purpose, but used a temporary wooden ladder, which was not intended for the purpose, and by using which he put himself into a position of great danger, and in consequence met with the accident causing his death. The question submitted to the Court was, whether upon these facts the Sheriff ought to have found as he did.

Held (1) that the Sheriff's decision was on a point of law, since it involved the construction of the statute, and that therefore the appeal was competent; and (2) that the accident was one "arising out of and in the course of the employment."

This was a stated case under the Workmen's Compensation Act 1897 in the matter of an arbitration under the Act between Mrs Durham, the widow of William Durham, 23 Queen Street, Leith, and Brown Brothers & Company, engineers, Rosebank Ironworks, Edinburgh. Mrs Durham claimed compensation under the Act in respect of the death of her husband, in consequence of injuries which he received in Messrs Brown's works on 23rd July 1897.

The Sheriff-Substitute (SYM) on 30th September 1898 pronounced the following interlocutor:—"Finds it not proved that the personal injuries sustained by William Durham on 23rd July last were caused by 'accident arising out of and in the course of the employment:' And finds that the claim cannot be maintained under the Workmen's Compensation Act 1897: Therefore assoilzies the defenders from the prayer of the petition," &c.

A case was stated by the Sheriff-Substitute to the First Division on the appeal of Mrs Durham.

The case was stated in the following terms:—"This is an arbitration between the appellant and the respondents, in which the appellant claims compensation under the Workmen's Compensation Act 1897, in respect of the death of her husband William Durham, who died in consequence of injuries which he received on 23rd July 1898 in the respondents' works. The appellant and her said children are, in the sense of the Workmen's Compensation Act 1897, the

dependents left by the said William Durham. The defences stated to the claim are (1) that the injury which Durham suffered was not caused by accident 'arising out of and in the course of the employment;' and (2) that said injury was attributable to Durham's 'serious and wilful misconduct.' The facts proved are as follow:—The deceased William Durham was on 23rd July 1898 a workman in the employment of the respondents. His wages were on an average £1, 1s. 1d. per week. The employment is one to which the Workmen's Compensation Act 1897 applies. If the employers are liable to pay compensation, £164, 9s. would be proper compensation. On 23rd July 1898 Durham was engaged, along with a boilermaker named Innes, on the ground floor of the works. They were engaged in measuring certain blocks. Durham was in an inferior position as regarded Innes. It was his duty to assist Innes in any work in which the latter might be engaged. Durham had always been considered a careful workman. On the ground floor, a short distance from the place at which the two men were working, were two furnaces used for heating steel ingots. On said 23rd July one of these was not in use and was cold. Above these furnaces was a long tank (formed of an old 'egg-end' boiler) containing water. It communicated by piping with the doors of the furnace, which doors were so constructed as to have water in them to keep them from becoming red-hot. The top of the tank was about 16 feet from the ground. The level of the water in the tank was regulated by a ball-cock. Outside the tank was a 'float' or index, to enable one to note how the water stood in the tank. On said 23rd July a small stream of water was observed by the men Innes and Durham to be running down on to the top of the furnace which was not in use. The cause of it was that the ball-cock had got out of position, but this was not at the moment apparent. The water could do little or no harm unless it continued to run for a long time. In that case it might have washed out some of the fire-clay between the bricks of the furnace. Innes, on observing the water, without giving any directions to Durham, went up to the tank to see what was the cause of its running down. As he was one of the workmen nearest to the spot, it was according to his duty in the circumstances to do so that he might report to the plumbers employed in the works if anything were wrong with the piping, or to the foreman if anything was wrong with the tank. That done, the duty of Innes in the matter was completed. In order to get up to the tank Innes used a fixed iron ladder, which was rested on an iron beam, and led up to one side (the east side) of the tank, and beyond it to certain plant higher up. This was only the usual and proper way to reach the tank. It did not bring the person who used it near any shafting, and was quite safe. Innes found the ball-cock out of position, and immediately put it right. Meanwhile Durham and a man named M'Guffie also went up to the tank. Durham and M'Guffie used a temporary wooden ladder, which led to a temporary wooden staging erected near the end of the tank, and the level of which was somewhat below that of the top of the tank. This staging was being used for the erection of some pulleys unconnected with the tank and furnaces. One stepping off the wooden ladder on to the staging was not high enough to see into the tank, and was some feet away from the tank. Durham, desiring to see into the tank, left M'Guffie and moved along the staging and round to the west side of the tank, a distance of about 12 feet from the wooden ladder in the direction which is shown in the photograph No. 1. This brought him very near, and below, a shaft for driving certain fans, which shaft was about 11 inches from the upper edge of the tank at the west side, and revolved at a very high rate of speed. Durham then put one foot upon a cock handle which projected from the side of the tank, reaching up his right hand at the same time to a perpendicular iron stay, which came down from the roof, in order to raise himself, and, if possible, to see into the tank, though even then he could not have done so, as the tank was covered. This position—namely, with one hand clinging to the stay and one foot on the cock handle—enabled him to lean over the revolving shaft, which, as I have mentioned, was 11 inches from the edge of the tank on that (the west) side, but it brought his breast close to, if not in contact with, the revolving shaft. The position was one of extreme and conspicuous danger, the more so that Durham was wearing a loose canvas jacket, and that just about his left shoulder was a 'coupling' in the shaft, the inequalities in which were likely to catch his jacket. Immediately after Durham got into this position, the breast or shoulder of his jacket caught in the revolving shaft, and he was whirled round it and so injured that he died. His death was attributable to his placing himself as I have described. Just as Durham was caught by the shaft, Innes had adjusted the ball-cock, which was at his (the east) side. I was of opinion, in regard to the first ground of defence, that considerations as to fault were not in place, and that the question was merely whether the injury suffered by Durham was caused by accident 'arising out of and in the course of the employment.' I thought that these words ought to be construed fairly, and with regard to the fact that the Workmen's Compensation Act 1897 is a remedial statute. But so construing them, I thought that it could not be affirmed that the injury suffered by Durham in the manner which I have described was caused by an accident 'arising out of and in the course of the employment.' In regard to the second ground of defence, I was of opinion that the deceased William Durham, if he had been ordered to place himself in the position which I have described, would have been entitled, and indeed bound, to have refused to do so. But I have found it unnecessary to determine whether his action was 'serious and wilful misconduct' in the sense of section 1, sub-section (2) (c), of the said Act."

The questions of law for the opinion of the Court are—"(1) Whether I ought, upon the facts stated, to have found that the injury to William Durham was caused by an accident arising out of and in the course of the employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897? (2) Was the action of Durham, which I have described, serious and wilful misconduct in the sense of said Act, sec. 1, sub-(2) (*c*)?"

Section 1 of the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37) provides:—Sub-section (1)—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." Sub-section (2)—"Provided that (*c*) if it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

It is provided by sub-section (3) that any question arising in proceedings under the Act as to liability to pay compensation, shall, if not settled by agreement, be settled by arbitration.

Schedule 2 of the Act provides for the arbitration taking place in the Sheriff Court, and by (14) (*c*) of that schedule it is provided that "it shall be competent to either party . . . to require the Sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session."

Argued for appellant—There was here a question of law, viz., whether the Sheriff on the facts before him had rightly construed the statute, and it was competent to raise such question on appeal—*Bremridge* v. *Turnbull*, November 2, 1895, 23 R. (J.C.) 12; *Dickson* v. *Linton*, June 1, 1888, 15 R. J.C.) 76. The Sheriff had taken too limited a view of the application of the Act. The accident clearly had taken place in the course of the deceased's employment, and arose out of it. As a member of the staff engaged in the engineering works it was part of his duty to help Innes in his work, and in the course of so helping him he lost his life. The Sheriff had held that he must be engaged in the particular branch of employment for which he was engaged, and that as the act in question was not exactly that particular branch the accident could not be said to be one arising out of his employment. He had further gone wrong in introducing the doctrine of contributory negligence, by holding that the fact that Durham had chosen a wrong and dangerous way of reaching the tank, supported his view as to employment. In point of fact the statute substituted for contributory negligence "serious and wilful misconduct," and the question whether Durham had been guilty of the latter had not been decided by the Sheriff.

Argued for respondent—(1) The appeal was incompetent. The question of law which alone could be determined by the Court must be one that had arisen before the Sheriff and had been considered by him. There must be some proposition in law which would serve as a precedent for the determination of other cases. Here there was no such question, for the Sheriff had merely given a decision upon a question of fact, and that must be final—*Grant* v. *Wright*, May 31, 1876, 3 Coup. 282; *Dykes* v. *Dixon*, February 7, 1885, 12 R. (J.C.) 17; *Fairbairn* v. *Sanderson*, October 27, 1885, 13 R. 81. The question as to the meaning of "employment" which was now argued by the appellant had not been stated to the Sheriff or considered by him. (2) But in any case the Sheriff's decision was right, for "employment" could only mean that particular form of employment in which the workman was engaged, not that of his fellow-workman. Moreover, in this case the workman had adopted a wrong and dangerous method where a perfectly safe one was provided, and it could not be said that an accident caused by his using this wrong method was one arising out of his employment.

At advising—

LORD PRESIDENT—The jurisdiction of this Court, under the Workmen's Compensation Act 1897 is limited to the decision of questions of law which have been determined by the Sheriff as arbitrator. This is the first case which has come before us under the Act, and as the competency of the case was challenged, it is right to consider the point attentively, although the procedure is the same as has been familiar to us for more than twenty years under special cases in other departments of the law. It is important, on the one hand, that we should readily give our aid in establishing the law of these questions, and, on the other hand, that we should keep the door shut against litigation over questions of fact which the Legislature has left to the final determination of arbitrators.

The first question put in this case, and the only one argued, is whether the arbitrator ought, upon the facts stated, to have found that the injury to William Durham was caused by an accident arising out of and in course of the employment in the sense of section 1 (1) of the Workmen's Compensation Act 1897, and the respondents maintained that the case was incompetent, as no question of law is put. Now, I accede to the three propositions advanced by the respondent,—that there must be a question of law arising on the stated case; that this must be a question which has been decided by the Court below; and that this Court can determine only that question and none other. These propositions do not, however, establish the respondents' contention that the present case is incompetent. I go with all that has been said on former occasions as to the inconvenience of stating cases which, after a long narrative of facts, baldly ask whether on these facts there is a case under the statute in hand. On the other hand, I do not think that it can be

affirmed absolutely, either that such cases are necessarily competent or necessarily incompetent. In some instances, where this form is adopted, a question of law may stand plainly disclosed, although it is not formulated. In other instances, the most diligent search will discover nothing more than a question of fact, although it may be a question of inference. It is, of course, far better explicitly to state the question of law, not only because this saves controversy and trouble in the Court of review, but also because, where the arbitrator sets himself to formulate the question of law, his ideas are a good deal clarified, both as to whether there is such a question at all, and also as to what are the facts relevantly bearing on the legal question where such exists.

Analysing the case before us I have come to the conclusion that there is a question of law, which was decided by the Sheriff. Shortly stated, the essential facts are these —Durham's employment was to help Innes in his work. In the course of Innes's employment he had occasion to go to a tank to see what was the matter with it. Although Innes did not specially order Durham to accompany him, it is plain that Durham would have been in the course of his employment if he had gone with Innes to the tank by the same way as Innes took. In fact Durham went to go to the tank. He took, however, a different way from Innes--a wrong way and a very dangerous way—and he lost his life in going. The Sheriff puts it very pointedly—"His death was attributable to his placing himself as I have described." Does this fact make it legally impossible that the accident arose out of or in course of Durham's employment? In my opinion it does not. I assume that the facts found by the Sheriff prove against Durham that he was negligent in choosing a palpably dangerous way to the tank, and that but for this negligence he would not have lost his life, as he would not have come near the revolving shaft which killed him. But the fact that a man takes a wrong way to do his work does not prove that he is not at the time in course of doing it. If at any given time a man is not in course of his employment this means that he has for the time ceased work to do something else. Now, according to the case, Durham had no reason to go to the tank except to do his duty. He was therefore in course of his employment. That the accident arose out of his employment, to wit, his employment to help Innes, is a necessary result of the same set of circumstances.

That an accident may be attributable to the negligence or fault of the injured, and at the same time may arise out of and in course of his employment in the sense of this Act, is the legal doctrine of the decision which I propose. This conclusion seems strongly supported, if not compelled, by proviso (*c*) of sub-section 2 of section 1, which forbids compensation where it is proved that the injury is "attributable to the serious and wilful misconduct" of the workman injured, the direct implication being that not all fault but only serious and wilful misconduct is to have this result, and that, subject to this limitation, accidents may fall under the Act even although they are attributable to the fault of the injured.

There is a second question put to us—Was the action of Durham serious and wilful misconduct in the sense of the Act? It seems to me, however, that we are precluded from considering and deciding this question by the statement of the Sheriff that he has not determined it. Although, therefore, the procedure may be little more than formal, I think the case must go back to the arbitrator.

I am for answering the first question in the affirmative, and remitting to the arbitrator to proceed.

LORD ADAM—It appears from the facts stated that Durham, who was killed on the 23rd July last, was a workman in the employment of the respondents. His duty was to assist a boilermaker named Innes in any work on which the latter might be engaged.

On the 23rd July Innes and he were engaged at work on the ground floor of the works, at a short distance from two furnaces. Above these furnaces, and communicating with them, was a long iron tank containing water.

On the occasion in question, and while engaged at their work, they saw a small stream of water running down on one of the furnaces.

It was the duty of Innes, we are told, to find out and report the cause of this leak. He accordingly, for that purpose, went up to the tank by a fixed iron ladder, which led to one end of the tank, and which, it is stated, was the usual or only proper way to reach the tank. Now, I think that if Innes had been injured while so engaged, it cannot be doubted that the accident would have been one arising out of and occurring in the course of his employment.

As regards Durham, it appears that Innes, when he went up to the tank, gave him no directions as to what he was to do. Left to himself Durham immediately ascended a temporary wooden ladder to a temporary staging, by which he made his way to the other end of the tank from that at which Innes was. He was there caught by a shaft revolving with great rapidity which passed close to the end of the tank, and so the accident happened.

The Sheriff-Substitute thinks that Durham put himself in a position of great and obvious danger, and I think, therefore, that if the defence of contributory negligence had been relevant the appellants would have had difficulty in making out their case. But the only question is, whether the accident which happened to Durham arose out of and in the course of his employment.

Now, I think that Durham's object in making his way to the tank as he did was to assist Innes in discovering the cause of the leak of water from the tank. The facts stated do not suggest to my mind any other reason for his going there. But if that was

his object, and if he was there for that purpose then the accident arose out of and in the course of his employment, because his duty was—and he was employed—to assist Innes in whatever work he might be engaged.

LORD M'LAREN—On the question of competency, I agree entirely with what has fallen from your Lordship, and will only add that every question on the construction of a statute is a question of law, and has been so considered in the other class of special cases with which the Court is familiar. But sometimes it happens that it is very difficult to formulate a question on the construction of a statute except by putting a real or hypothetical case, and inquiring whether the statute governs it. The present case is a good illustration of what I mean. I have myself found it difficult to formulate the question of law upon which our opinion is asked apart from the facts of the case. But then the facts raise a question of the construction of the Act, the decision of which may govern a great number of cases, not identical in their facts, but having an element in common which would make the decision a precedent.

On the merits it appears to me that the Sheriff's decision can only be supported on the ground that as the death of Durham was attributable to his personal negligence, it could not be said to arise "out of and in the course of the employment," but that is virtually to qualify the enactment by introducing the doctrine of contributory negligence, which was plainly intended to be abolished in cases governed by the Act. Instead of contributory negligence we have a different exception to the employees' liability, viz., "serious and wilful misconduct on the part of the workmen." When there is no serious or wilful misconduct, or apart from serious and wilful misconduct, it seems to me that the accident must be taken to arise out of and in the course of the employment, if the accident happens to a workman who is lawfully there for the purpose of carrying on the work for which he is hired, and the man has not left his place of work for his own purposes. Of course, if the workman leaves the part of the works where he is employed, and goes to another part where he has no business, and the accident happens to him there, a very different question would arise.

Now, although it may be that Durham's act in climbing up to the neighbourhood of the revolving shaft was unnecessary, it is not found as a fact that he did so for his own pleasure, or that he was acting otherwise than in the *bona fide* exercise of his vocation as a boilermaker's assistant. I agree accordingly that we should answer the first question in the affirmative.

I agree also that we are unable to answer the second question, because we have no jurisdiction except in appeal, and no decision was given by the Sheriff on this question from which an appeal could be taken.

LORD KINNEAR—I concur. Whether the deceased was bent on his master's business or on a different object of his own is a question of fact, but as I read the case that is not the question put to us. The Sheriff has stated the specific facts on which the answer to that question depends, and I agree with your Lordships that he went wrong, not because of any erroneous inference in fact, but because he misconstrued the statute. It appears to me that he puts a construction on the Act which is a great deal too narrow, and would exclude cases which are clearly intended to fall within it. It is not necessary to recapitulate the points arising in the case, because I agree with all that has been said by your Lordships upon them. There are two points which seem to be raised by the Sheriff's statement which may be considered as points of law, and which I think are reasonably clear. First, that a man does not cease to be in the course of his employment merely because he is not actually engaged in doing what is specially prescribed to him, if in the course of his employment an emergency arises, and without deserting his employment he does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his master. In this case the duty which the Sheriff finds lay on the other boilermaker, and consequently on the deceased, to see what was wrong, makes it manifest that he was not deserting his employment, but was carrying out his duty at the time of the accident. Second, it does not seem to be arguable that a man ceases to be in the course of his employment because he takes a wrong or dangerous method of doing what might be done safely if it was to be done at all. On these grounds I agree that the first question should be answered as your Lordship proposes.

On the second question I also agree that if it arises we cannot answer it, because the Sheriff has not determined it in stating the facts upon which it may be raised.

The Court answered the first question in the affirmative, and remitted to the arbitrator to proceed.

Counsel for Appellant—G. Watt—Trotter. Agent—J. Kinghorn Miles, Solicitor.

Counsel for Respondents—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Tuesday, December 6.

SECOND DIVISION.

STIRLING'S TRUSTEES *v.* STIRLING.

Succession—Vesting—Accretion—Power of Appointment—Validity of Exercise of Power—Partial Appointment.

In a marriage-contract it was provided that upon the decease of the husband the trustees should uplift certain life policies conveyed to them and invest the proceeds for behoof of the persons interested in the trust; that they should pay the income to the wife if