The Court adhered.

Counsel for Pursuer (Respondent)—J. Burnet. Agent—Knight Watson, Solicitor.

Counsel for Defender (Reclaimer)—Trayner—Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, October 18.

SECOND DIVISION.

[Sheriff-Substitute of Fifeshire.

SEELEY *v.* JACKSON & SONS.

Master and Servant—Reparation—Negligence—Risk incidental to Employment—Implied Contract by Workmen to take such Risks—Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 1, *sub-secs.* 1 *and* 2.

Circumstances in which the Court *held* that an accident which occurred to a workman, without fault of his own, and while he was engaged in the service of his employer, was a pure misadventure, which had not been caused by any *culpa* for which the employers were responsible at common law or under the Employers Liability Act 1880, and the risk of which was one of the risks incident to the employment.

Observations per Lord Young on the law applicable to such cases.

This was an action of damages for bodily injury by a labourer against his employers, in which the pursuer claimed damages alternatively at common law and under the Employers Liability Act 1880. From the proof led the following facts appeared—A number of workmen, one of whom was the pursuer, were engaged in the defenders' iron foundry in removing from the moulding-room to the courtyard outside a large iron casting weighing between two and three tons, and measuring about four feet in length and eighteen inches in diameter. The operation was conducted under the personal supervision of one of the partners of the defenders' firm. The floor over which the casting required to be conveyed to the yard was somewhat rough and uneven, but not more so than is common in moulding shops of the kind. The principal depression was one near the door, and on it iron plates had been laid to facilitate the passage of the bogie upon which the casting was being removed. This depression was about two feet broad, and at the deepest part was three or four inches in depth. The nature of the bogie and the manner in which the accident happened were thus described in the interlocutor of the Sheriff-Substitute, by which he found—"(2) That the casting was placed on a bogie which has four wheels, two being placed on an axle in the centre, and one being placed at each end, fastened by a bracket so placed that when the frame of the bogie is parallel with the ground, the two end wheels are somewhat removed from the ground, and the bogie is balanced on the two centre wheels. (3) That in the course of the operation the bogie stuck fast, and the hind wheel came in contact with the ground; that the bracket attaching the wheel to the body of the bogie broke, and the end of the bogie being thus left without support, dropped to the ground, and the casting slipped back and ultimately toppled over and fell upon the pursuer's leg, which was so severely crushed that it had to be amputated." It was proved that the bogie which was used on the occasion in question had been frequently used in the conveyance of castings of not less weight than that which was upon it when it broke down, and was regarded as the best bogie in the defenders' works. It was also proved that some years before the accident the bracket at the end of it had broken down in a similar manner to that in which it broke down in the accident in question, and that it had been replaced by a new one of a somewhat heavier description.

The pursuer pleaded, that having been injured through the fault of the defenders in not providing a bogie of sufficient strength to bear the weight placed upon it, he was entitled to damages at common law. He also pleaded, that having while in the employment of the defenders been injured by a defect in their ways, works, machinery, or plant, he was entitled to damages under sec. 1, sub-sec. 1, of the Employers Liability Act 1880, which provides that "where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman. . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work."

The defence was a denial of fault in providing insufficient machinery or otherwise.

The Sheriff-Substitute (Gillespie), on the ground that the bogie was suitable and apparently sufficient for its purpose, and that the defenders had no reason to suspect any flaw in the bracket, assoilzied the defenders.

The pursuer appealed to the Court of Session. The Court being of opinion, in point of fact, that the accident was a pure misadventure, and was not caused by any negligence in the conduct of the operation of removing the casting, and that no insufficiency was established in the defenders' plant or works, refused the appeal and affirmed the interlocutor of the Sheriff.

At advising the following observations on the law applicable to such cases were made by

Lord Young—Our law undoubtedly is that in every contract between employer and workman there is an implied term that the workman takes the risk of all ordinary accidents attending a more or less risky trade, leaving a claim for compensation only in circumstances where the accident is attributable to *culpa*. If the *culpa* be on the part of the master, then the claim lies against him; if on the part of a fellow-workman, he has also a claim against the latter; and under the recent statute, in certain circumstances against the employer, where it formerly existed only against a fellow-workman. Agreeing as I do with your Lordships that this was just one of these accidents where there was not present that which the law esteems fault, I must concur in the conclusion that the risk was one of which the workman undertook by his contract of service to bear the consequences, and that he has in the circumstances no claim for compensation.

Counsel for Pursuer (Appellant)—Johnstone—G. Burnet. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Counsel for Defenders (Respondents)—Trayner—Baxter. Agent—R. W. Wallace, W.S.

Thursday, October 19.

FIRST DIVISION.

[Lord Lee, Ordinary.

SINCLAIR *v.* BROWN BROTHERS.

Property — Feu-Contract—Mutual Gable—Obligation on Adjoining Feuar in Towns to Repay Half Cost of Erection of Mutual Gable to Feuar who has Built it—Obligation to Pay Half Cost imposed by a Contract which is Silent as to Time of Payment.

A, a superior, feued a part of his lands to B, and five years later a further portion to C, the feu last given off being adjacent to that already granted to B. By his feu-contract B was taken bound to erect a mutual gable, one-half upon his own ground, and the other half upon that of his neighbouring feuar, against whom he had the right of recovering one-half of the cost of erecting the wall, but the contract was silent as at what time repayment could be demanded. C erected some temporary buildings upon his feu, whereupon B demanded repayment of half the cost of the mutual gable which he had erected according to the obligation in his feu-contract. C refused payment on the ground that he had made no use of the pursuer's gable. *Held* (1), on a construction of the feu-rights of the parties, that C was liable under his feu-contract to make immediate payment of half the expense of the mutual gable irrespective of his making use of it; but (2) that he had not made such use of the gable so as to bring him within the common law obligation of recompense, and that therefore he ought not to be found liable in the expense of a proof directed to establish that he had made use of the gable.

By feu-charter entered into between James Steel, builder in Edinburgh, and Peter Sinclair, also builder there, dated 4th and 5th, and recorded 20th October 1876, Steel, as heritable proprietor of the lands, disponed to Sinclair certain portions of the lands of Dalry situated on the south side of the street called Caledonian Crescent, all lying in the county of Edinburgh. By the feu-contract it was, *inter alia*, provided that the eastmost gable of the tenement to be erected on the eastmost area, and the westmost gable of the tenement to be erected on the westmost area of the ground feued should have vents carefully carried up and openings left where pointed out by Mr Steel or his successors, and the said gables should be common to Sinclair and his successors and the feuars adjoining the said areas on the east and west respectively, and should be built to the extent of one half of the thickness thereof on the ground feued by said feu-contract, and to the extent of the other half on the ground adjoining the same on the east and west respectively; and the cost of erecting these mutual gables, whether built by Sinclair or by the adjoining feuars on the east and west, should be borne equally by the feuars to whom they should respectively belong in common, but no part of such cost should be borne by Mr Steel, and that Sinclair should be entitled to recover from the adjoining feuars their respective shares of the cost of his erecting the said mutual gables; and, on the other hand, Sinclair was taken bound to pay Mr Steel or the adjoining feuars, as the case might be, the proportion effeiring to him of the cost of erecting the mutual gables, if said gables were erected by Mr Steel or the adjoining feuars. The said feu-contract also provided that Sinclair should be bound to enclose the back ground behind the tenements by building a division dwarf-wall with an iron railing as therein mentioned, or if Mr Steel should consider a high wall necessary, he was taken bound to erect a rubble wall having a hammer-dressed rounded cope; and it was declared that the division-walls and railings on the east and west of the areas should be common to Sinclair and the feuars of the adjoining ground on the east and west respectively, and that the cost of erecting them, whether built by him or the adjoining feuars, should be borne equally by him and the feuars to whom they should belong in common; and it was provided that he should be entitled to recover from the adjoining feuars their respective shares of the cost of erecting the said mutual division-walls. Prior to the term of Whitsunday 1877 Sinclair had erected, in terms of the feu-contract, a tenement upon the westmost area feued to him.

In terms of the feu-contract, Sinclair built the westmost gable of his buildings on the westmost area of ground feued to him to the extent of one half the thickness thereof on the ground which he had feued, and to the extent of the other half of the thickness thereof on the adjoining ground to the west, which ground was not then built on to any extent. He also, prior to Whitsunday 1877, built a division-wall between his area and the ground to the west, as provided for in the feu-contract.

A second feu-contract was also entered into by Steel with David Brown and Robert Brown, the partners of the firm of Brown Brothers, the defenders in the present action. This contract was dated 4th and 5th March 1879, and 11th and 12th October 1880. By it a further portion of the lands of Dalry, also lying on the south side of Caledonian Crescent, and immediately to the west of and bounding the ground feued to Sinclair, was conveyed to David and Robert Brown as trustees for the firm of Brown Brothers. By this last-mentioned feu-contract the defenders David Brown and Robert Brown bound themselves and their said firm to erect on the piece of ground thereby feued, so far as not already done, buildings which should be of the yearly value of at least double the feu-duty payable by them. This feu-contract also contained the following provision:—"And in respect the said Peter Sinclair or his successors in the foresaid ground feued to him have erected thereon one or more tenements of dwelling-houses, the westmost gable of which is built to the extent of one half of the thickness thereof on their said ground, and to the extent of the other half on the ground hereby feued, it is hereby provided that the said disponees shall be bound to pay to the said Peter Sinclair or his successors the one-half of the cost of erecting the said gable, which shall thereafter be mutual and belong in common to the said disponees