against the deferred shareholder is not upon the preparation of the accounts, but is upon the question of having the general meeting and getting the sanction of the auditor to the dividend that is to be declared, and the proviso does not deal with any of these things, but only with the preparation of the accounts. The only way in which that might be got over is by section 4 (3), which was used in argument by both parties, viz.—"Any statutory provisions affecting the Railway Company shall be read with the modifications necessary to bring them into conformity with this section." It may be that if the Railway Company were told to prepare half-yearly accounts that would practically modify sub-section (1), which says that a general meeting need only be held once a-year. I do not know, because in the view I have taken it is not necessary to go into these things. I only say, as I am dealing with the third sub-section, that I do not think it will avail to upset a general rule to show that the modification that here is necessary to allow the statutory provisions to work is a modification which will destroy private rights. If my first argument is right, that is not so, because, as I have already shown, the statute will work perfectly well as it is. It does not matter that the state of affairs will in this sense be a little altered that the eventual outcome of the deferred shareholders' rights will only be known at the end of the year instead of at the end of each half-year. It was put to us that there might have been a change in the holder of the stock during the currency of the year. But there is nothing in that. The right to a dividend effeirs to the particular portion of stock. As to who holds that stock, whether it is A or B, that is of no importance to the company declaring the dividend, and all those things, as one knows in practice, are settled by making Stock Exchange transactions either *ex* dividend or *cum* dividend. Upon the whole matter I have come to the conclusion that we should answer the second question that is put to us in the affirmative, and it is unnecessary to answer the first and third questions.

LORD KINNEAR—I concur.

LORD JOHNSTON—I also agree in the opinion which your Lordship has delivered. I was disposed at the hearing of the case to think that the proviso at the end of section 4 (1) of the Act of 1911 might be so interpreted as to make the present case an exception to the general application of the Act, on the footing that in the sense of that proviso the preferred shareholders might be held to have a guarantee of a preferable dividend from the deferred shareholders. I have come to be quite satisfied that that is not the case, and that that sub-section and its proviso does not apply to their position. Section 4 (2) on the other hand is entirely applicable, and I think clears the ground of all difficulty. If the directors in the exercise of their discretion choose to declare an interim dividend on the first half-year's working on the preferred shares they will do so as an interim dividend only. When accounts are made up at the end of the year it will be necessary to include in the accounting such a balance at the end of the first half-year as will determine what the preferred shareholders would have received had the Act of 1911 not passed, under these contract rights. This will not prevent the Act having its full effect. There will be one proper balance of the company's accounts, one audit, one meeting, and one declaration of a dividend. But there will be a subsidiary calculation required in order to ascertain whether the interim dividend of the first half-year to the preferred shareholders has to be supplemented for that half-year, or whether these shareholders require to be surcharged in crediting them their dividend for the second half-year.

LORD MACKENZIE did not hear the case.

The Court answered the second question of law in the affirmative, and found it unnecessary to answer the remaining questions of law.

Counsel for First Parties—D.-F. Scott Dickson, K.C.—Macmillan, K.C.—E. O. Inglis. Agent—James Watson, S.S.C.

Counsel for Second Party—Cooper, K.C. —Gentles. Agents—W. & J. Burness, W.S.

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*Friday, July* 18.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.

## KINGHORN *v.* GUTHRIE.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident "Arising Out of" Employment—Storm.*

*Held* that a carter who while leading a horse and lorry out of his employer's yard in the course of his employment was struck by a piece of corrugated iron blown by a high wind off the roof of an adjoining building, was not injured by an accident "arising out of" his employment.

*George Anderson & Company* (1905), *Limited* v. *Adamson*, July 12, 1913, 50 S.L.R. 855, *distinguished.*

Peter Guthrie, carter and salesman, Leith, *respondent*, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from James Kinghorn, trading as R. L. Thomson & Company, firewood merchants, Leith, *appellant*, the matter was referred to the arbitration of the Sheriff-Substitute at Edinburgh (GUY), who found the respondent entitled to compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"This is an arbitration in which the respondent claims compensation from the appellant in respect of injuries received by the respondent by accident which he alleges arose out of and

in course of his employment with the appellant. The appellant is a firewood merchant and carries on business at 47 West Bowling Green Street, Leith. The appellant's premises consist of a large yard on which stands his firewood factory, and are reached from West Bowling Green Street by a private passage 17 to 22 feet wide. The said passage and yard are much exposed to high winds and are surrounded by unsubstantial buildings. On the day on which the accident occurred —26th November 1912—the wind between three and four o'clock in the afternoon blew at the rate of 52 miles an hour or thereby on the top of Blackford Hill, 4 miles distant and 500 feet higher up than said yard. No evidence was adduced as to the velocity of the wind in the appellant's said yard and passage or cart entrance. On said date the respondent, who was a carter and firewood salesman to the appellant, was leaving the said premises in charge of a horse and lorry loaded with firewood for sale, and while he was still within the appellant's said yard he was struck by a sheet of corrugated iron which was blown off the roof of an adjoining building, a distance of about 70 feet. Said roof had blown off three or four times in the last few years, and on the occasion in question twenty-eight sheets of the said corrugated iron which formed the roof of said building fell into the appellant's yard, and three or four sheets were blown into West Bowling Green Street. The respondent's head was cut, three of his ribs were fractured, and he was otherwise injured. The respondent had been out all day with his horse and lorry, along with a boy in the appellant's employment whose regular duty it was to assist him. The accident happened between three and four o'clock in the afternoon, and immediately after it the appellant sent said horse and lorry loaded with firewood out in charge of two young boys. I found that the said accident arose out of and in the course of his employment, that since the date of the accident the respondent has been and still is incapacitated for work as the result of the accident, that his average weekly earnings for the twelve months prior to the accident were £1, and accordingly found the appellant liable to the respondent in compensation at the rate of 10s. per week, and awarded compensation accordingly from 26th November 1912."

The *question of law* was—"Did the accident which the said Peter Guthrie sustained on 26th November 1912 arise out of his employment with the said James Kinghorn within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellant—The accident did not arise "out of" the respondent's employment. The employee here had been subjected to a general public danger—a high wind; and in such cases it was necessary to show something in the employment of the workman which made him subject to a greater risk than a member of the public. The present case was different from that of *George Anderson & Company* (1905), *Limited* v. *Adamson*, July 12, 1913, 50 S.L.R. 855, founded on by the respondent, in which it was admitted that the pursuer, who had been struck by a slate blown off a roof by the wind, was at the time in the course of his employment stooping over a large wheel and therefore did not see the slate coming. In other cases of the same class it had been held that compensation was not payable—*Rodger* v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413; *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; *Murray* v. *Denholm & Company*, 1911 S.C. 1087, 48 S.L.R. 896; *Craske* v. *Wigan*, [1909] 2 K.B. 635; *Amys* v. *Barton*, [1912] 1 K.B. 40. As illustrations of cases within the class where there was something in the nature of the employment at the time which exposed the workman to special risk appellant cited *M'Neice* v. *Singer Sewing Machine Company, Limited*, 1911 S.C. 12, 48 S.L.R. 15, and *Challis* v. *London and South-Western Railway Company*, [1905] 2 K.B. 154.

Argued for the respondent—The present case was ruled by *George Anderson & Company* (1905), *Limited* v. *Adamson*, *cit. sup.* In both cases the accident was due to the same storm, and in both was caused by something being blown off the roof of an adjoining building. In the present case the man was taking charge of a horse and lorry in the course of his employment, and that prevented him seeing. The case of *M'Neice* v. *Singer Sewing Machine Company, Limited*, *cit. sup.*, was an authority in respondent's favour.

LORD SALVESEN—The facts in this case are very simple. It appears that the respondent, who was a carter in the employment of the appellant, was engaged with his horse in the appellant's yard, which is situated near West Bowling Green Street, Leith, when he was struck by a sheet of corrugated iron which was blown off the roof of an adjoining building, a distance of about 70 feet. It is said—I do not think it is material—that the roof of the same building, which was of an unsubstantial character, had been blown off on three or four previous occasions within the last few years, but there is nothing to suggest, so far as the knowledge of the appellant is concerned, that it had not been replaced in a suitable manner.

Now these being the facts of the case, and the only material facts, the Sheriff-Substitute has reached the conclusion that this accident arose, not merely in the course of the employment, which is admitted, but out of the employment of the respondent. I am quite unable to assent to that view. I adopt the language of the Master of the Rolls in the case of *Craske* v. *Wigan*, [1909] 2 K.B. 635, where he says—"I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these Acts came into operation, namely, to hold that it is not enough for the applicant to say—'The accident would not have happened if I had not been engaged in that

employment, or if I had not been in that particular place.' He must go further and say—'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that kind is established the applicant must fail, because the accident is not one arising out of and in the course of the employment."

I put the question that was put by the Lord President in the case of *Rodger* (1912 S.C. 584)—What were the special risks incident to the employment of this workman? I should have thought the risk of being kicked by his horse, or of being injured in the course of driving his horse through the traffic along the streets; but certainly no one would have said that one of the risks of his employment as a carter was that a piece of corrugated iron might come down from a neighbouring building seventy feet away and hit him on the shoulder and face. That is not what one would describe as an ordinary risk. It is an extraordinary occurrence—a thing that might occur when a great gale is blowing. The workman is not specially exposed to that risk because of his employment. It may be that the locality is one which is windy, or it may be a locality where the houses are less substantial than they are in other parts of the town; but that is not a risk arising out of his employment, for any person frequenting the yard would be exposed to exactly the same risk. It is, of course, true that he would not have met with the accident unless he had been in that particular place, and that he would not have been in that particular place unless he had been engaged in that particular employer's work; but as the Master of the Rolls said, that is not enough; you must point to something in the nature of the employment that makes you peculiarly liable to a risk of that kind.

Now the only case that presents some difficulty at first sight is the case to which we were referred—*Anderson* v. *Adamson*—in which the First Division held the other day that an accident occurring through a slate falling on a person who was working in a back-green was, upon the admitted facts of the case, an accident arising out of the employment. But then we have not the same facts admitted in this case as were admitted there. The two facts which were admitted there, and which seem to me to differentiate this case entirely from that of *Anderson*, are, in the first place, that the man there was stooping over his work and was therefore unable to avoid a danger from above; and, in the second place, that other workmen who were in the same place, but who were not compelled to stoop, were able to avoid, and did in point of fact avoid, exactly the same danger to which he succumbed. It was held by the First Division that the workman's special employment had appreciably increased the risk of accident of this particular kind; and upon that ground, although the Court thought it was a narrow case, they did not interfere with the decision at which the Sheriff had arrived.

The present case is quite distinguishable from that of *Anderson;* and we would be opening the door very wide—it has already been opened pretty wide in workmen's compensation cases—if we were to hold that because a man is employed in a particular place, therefore any accident which occurs to him in that place because of the nature of its surroundings is an accident arising out of his employment. I think that would be going a great way beyond any of the decided cases. I have therefore no difficulty in holding that we should sustain the appeal, and hold upon the facts stated that the Sheriff was not entitled to find in law that the accident to the respondent arose out of his employment.

LORD DUNDAS—I do not entertain so clear and confident an opinion as my brother Lord Salvesen about the way in which this case ought to be disposed of. I have had, and still have, some doubt about the matter, but I do not press it so far as to dissent from the conclusion proposed, in which I understand your Lordship and my brother Lord Guthrie concur. I confess I find it rather difficult to point to any really substantial or satisfactory distinction between this case and that of *Anderson* v. *Adamson*, decided a few days ago in the other Division. Then again, the Sheriff-Substitute is of course the master of fact, and the question here is largely, though not entirely, one of fact. But your Lordships, as I understand, all consider that upon the facts found the arbiter was not entitled in law to hold as he has done, and having stated my doubt about the matter I do not propose to say anything more.

LORD GUTHRIE—I concur in the opinion expressed by Lord Salvesen. It is admitted that this unfortunate occurrence was an accident within the meaning of the Act. It is further admitted that what took place was in the course of the man's employment. Mr Chisholm submitted an argument under two heads to justify the Sheriff's finding that what took place arose out of the employment. He said, in the first place, that he did not need to show any special risk, but if this were necessary that the facts found disclosed a special risk. I think that if anything is certain in this class of case it is that in order to justify an award such as we have here there must have been some special risk to which the workman was exposed.

Special risk may be one or other of three kinds. It may be owing to the nature of the employment at the time. All that can be said about that is, that at the time the respondent was in charge of his employer's horse and lorry, and it was said that he was therefore not in a position to attend to his own safety in the same way as an ordinary passer-by would be able to do. I do not see, in relation to the kind of accident we have here, that the finding in fact justifies the inference which Mr Chisholm

draws from it. In the case of *Anderson* v. *Adamson* it is noticeable that the First Division thought the case a narrow one, and that Lord Johnston was careful to put the judgment of the Court expressly on the two admissions which have been noticed by Lord Salvesen.

Second, you may have special risk owing to the general nature of the man's employment; but in relation to the accident here there was no special risk due to his employment as a lorryman. In the third place, you may have special risk arising from the place where the accident happened. We are told that the adjoining roof had blown off three or four times within the last few years, but it is not said that on these previous occasions any part that was blown off fell into the place where this man was injured. I therefore think, without questioning the judgment in *Anderson* v. *Adamson*, that the question should be answered as Lord Salvesen proposes.

LORD JUSTICE-CLERK — I concur in the judgment proposed. If I had had to decide a case with the same facts as those in *Anderson* v. *Adamson* before it had been dealt with by the other Division I should have had the greatest possible difficulty in coming to the conclusion that the judgment of the Sheriff awarding compensation should be affirmed. Their Lordships of the First Division indicated plainly that they looked upon that case as a very narrow one, and I think we find in the opinion of Lord Johnston a circumstance referred to which distinguishes that case from the present. His Lordship says—"The fact that he, *i.e.*, the workman, was engaged in the open air, bending over to adjust heavy machinery, is a fact from which it may reasonably be deduced that in the circumstances of his particular vocation he was exposed to something apparently beyond the normal risk, and that to this abnormal exposure the accident was attributable." Now that seems to me to distinguish that case from the present. If a man is obliged to keep his eyes towards the ground while he is stooping to do something, he is in a totally different position from the driver of a van or a lorry whose business it is to keep his eyes about him, not to stoop and look down. Accepting the view so clearly expressed by the Master of the Rolls in the case referred to by Lord Salvesen, I think it is not possible to hold in this case that there is ground for saying that the accident arose out of the employment. On these grounds I agree with your Lordships.

The Court answered the question of law in the negative.

Counsel for the Appellant — Moncrieff, K.C. — C. H. Brown. Agents — Cairns & Robertson, S.S.C.

Counsel for the Respondent — Chisholm, K.C. — A. A. Fraser. Agent — Sterling Craig, S.S.C.

*Wednesday, July* 16.

## FIRST DIVISION.

[Sheriff Court at Hamilton.

## PATON *v.* WILLIAM DIXON, LIMITED.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—*Injury by Accident—Natural or Probable Consequence—Disease.*

A workman sustained an injury to his back on 7th December 1911, which totally, and thereafter partially, incapacitated him for work. On 1st May 1912 the medical referee certified that he would be fit for his usual work in three weeks, and he accordingly resumed his old work on 27th May 1912. From that date he worked regularly until 15th August 1912, when he again became totally incapacitated owing to aneurism of the heart. He was not troubled with pain in the cardiac region until July 1912, nor did any of the medical men (including the medical referee) who examined him at or before 1st May 1912 suspect any cardiac trouble. The workman having claimed compensation under the Workmen's Compensation Act 1906 in respect of the accident of 7th December 1911, the arbitrator refused compensation.

*Held*, on appeal, that there was evidence on which the arbitrator might find as he did, and appeal *dismissed*.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between John Paton, miner, High Street, Blantyre, *appellant*, and William Dixon, Limited, coalmasters, Blantyre, *respondents*, the Sheriff-Substitute (SHENNAN) refused compensation, and stated a Case for appeal.

The *facts* were as follows:—"1. The appellant, who is 42 years of age, was on 7th December 1911 a workman in the respondents' employment at No. 3 Pit, Blantyre Colliery. He was employed as a miner at the coal face. 2. On that day when he was throwing out lumps of coal he twisted his back and racked himself. 3. He went out to his work the following day, but his back became so painful that he took to his bed. 4. The respondents paid him compensation of 16s. 3d. per week in respect of total incapacity until 17th February 1911, and thereafter in respect of partial incapacity 10s. per week until 3rd March 1912, when the amount was reduced to 8s. 3d. per week. 5. A dispute having arisen between the parties as to the appellant's capacity for work they agreed to refer the matter to a medical referee. On 1st May 1912 the medical referee certified that the appellant was then able for light work and that if he could obtain this he would be ready for his usual work in three weeks. 6. The respondents stopped payment of compensation on 22nd May 1912, and the appellant makes no claim for compensation for the period between that date and 15th August 1912. 7. The appellant resumed his