Wednesday, November 10.

SECOND DIVISION.

[Sheriff Court at Aberdeen.

SIMPSON *v.* SINCLAIR.

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

A woman employed as a fish-curer was injured while working in her employer's shed by the fall of a wall which was being erected on adjacent premises. *Held* that she was not injured by an accident arising out of her employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in which Mrs Margaret Thom or Simpson, fish-worker, wife of and residing with Robert Simpson, cooper, Aberdeen, with her husband's consent and concurrence, *respondent*, claimed compensation from Donald Sinclair, fish-curer, Old Ford Road, Aberdeen, *appellant*, the Sheriff-Substitute (YOUNG), at Aberdeen, awarded compensation, and at the defender's request stated a Case for appeal.

The Case set forth—"The following are *facts* admitted or proved—1. That on or about 26th January 1915 the respondent, who was then a fish-worker in the employment of the appellant, a fish-curer, was engaged in packing kippered herrings into boxes, the work being done according to order in premises assigned for the purpose—a shed belonging to the appellant, which had brick walls 7 feet high and a roof of corrugated iron, and was lit by obscured windows in the roof. 2. That between ten and eleven o'clock that morning, when the respondent was so engaged and her attention was occupied with her work, a brick wall, about 20 feet high and in the course of erection close by the appellant's property, and on ground contiguous thereto belonging to another fish-curer, fell by reason of its own instability upon the shed, bringing down the roof and part of the wall next the said ground, so that the respondent and other workers were buried under the wreckage. 3. That the fallen material was composed mainly of the corrugated iron and rafters forming the said roof, and of bricks from the wall on the adjoining property. 4. That in consequence of the accident three women workers lost their lives and six others were hurt, and the respondent in particular sustained injuries so serious that she was rendered totally incapable for work. 5. That this total incapacity still continues. 6. That the conditions of the respondent's employment obliged her to work where she was and exposed her to the risk of said accident. 7. That the respondent was for about three years in the employment of the appellant prior to the accident, and her duties consisted in splitting herrings, hanging them on fixed tenter-hooks, and packing them in boxes when kippered. 8. That the accidents which are commonly met with by fish-workers in the course of their employment are cuts or punctures of the hand. And 9, that the respondent's average weekly earnings during the twelve months previous to the accident amounted to 14s. On the foregoing facts I *held* that the accident to the respondent arose out of and in the course of her employment, and I awarded her compensation at the rate of 7s. per week from 2nd February 1915 and until the further orders of the Court. I found the appellant liable in expenses."

The *question of law* for the opinion of the Court was—"Whether upon the facts it could be competently found that the personal injuries sustained by the respondent were caused by accident 'arising out of' her employment, within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellant—The accident did not arise out of the employment. It was not sufficient to say that the accident would not have happened if the appellant had not been working in that particular place. It must be peculiarly incidental to the employment, and that was not the case here—*Craske* v. *Wigan*, [1909] 2 K.B. 635, *per* Cozens-Hardy, M.R., approved in *Plumb* v. *Cobden Flour Mills Company, Limited*, [1914] A.C. 62, 51 S.L.R. 861; *Guthrie* v. *Kinghorn*, 1913 S.C. 1155, 50 S.L.R. 863; *Adamson* v. *George Anderson & Company, Limited*, 1913 S.C. 1038, 50 S.L.R. 855.

Argued for the respondent—The accident arose out of the employment. No doubt the risk was one to which any member of the public might have been exposed, but what distinguished it from such general risk and made it peculiarly incidental to the employment was its continuity. If an applicant for compensation in the case of a general public danger could show (1) exposure in a more intense degree, or (2) for a longer time than the public, arising out of the employment, then the applicant would be entitled to recover—*Hughes* v. *Bett*, 1915 S.C. 150, 52 S.L.R. 93; *Sheldon* v, *Needham*, 1914, 7 B.W.C.C. 471; *Rodger* v. *Paisley School Board*, 1912 S.C. 584, 49 S.L.R. 413. It was a question of fact for the arbiter whether the risk incurred by the workman was greater than that incurred by members of the public—*Fitzgerald* v. *W. G. Clarke & Son*, [1908] 2 K.B. 796; *Andrew* v. *Failsworth Industrial Society, Limited*, [1904] 2 K.B. 32; *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254.

LORD JUSTICE-CLERK—In this case the question of law submitted to us is shortly this—whether the accident which caused the injuries to the respondent arose out of her employment in the sense of the Statute of 1906? and the main finding on which it is contended that the accident did arise out of the employment is the sixth, which is in these terms—"That the conditions of the respondent's employment obliged her to work where she was, and exposed her to the risk of said accident?"

I think there is a proper question of law raised here, and on consideration I have come to be of opinion that the arbitrator's

view is not the correct one. As is always the case in appeals of this sort there has been a very full citation of authorities. For my part I think the question we have now to consider may be satisfactorily dealt with by reference to three of these authorities—*Craske* v. *Wigan*, [1909] 2 K.B. 635; *Guthrie* v. *Kinghorn*, 1913 S.C. 1155; and *Plumb* v. *Cobden Flour Mills Company, Limited*. [1914] A.C. 62. In the case of *Craske* Cozens-Hardy, M.R., said this—"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 must 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."

Buckley, L.J., in his judgment makes the matter clearer still where he says, [1909] 2 K.B. at p. 639—"I adhere to what I said in *Fitzgerald* v. *W. G. Clarke & Son*, [1908] 2 K.B. 796, at p. 799," and then he quotes as follows:—"The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident; the latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed in the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." Then he goes on to deal with the circumstances of the case, and says—"The fact that the applicant struck herself was due, no doubt, to involuntary excessive muscular action arising from the excessive susceptibility of her own nerve centres. It was not due to any cause attributable to her employment as a lady's maid. The blow was not an accident arising out of the employment. The arguments on behalf of the applicant have been too extravagant to do more than provoke a smile. I feel a difficulty in dealing with them in a serious vein."

Then Lord Dunedin in the case of *Plumb*, after quoting the passage from the judgment of the Master of the Rolls, says this—"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. Illustrations of the first proposition will be found in all the cases where the risk has been found to be a risk common to all mankind and not accentuated by the incidents of the employment. In application to facts the dividing line is sometimes very nearly approached, but I think that in all the cases the principle to be applied has been rightly stated. The cases themselves are too numerous to cite, but I may mention as illustrations the two lightning cases of *Kelly* v. *Kerry County Council*, (1908) 42 I.L.T.R. 23, and *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K.B. 32, where on the facts the stroke of lightning was held in the Irish case to be a common risk of all mankind; in the English case a risk to which by the conditions of employment the workman was specially exposed. Both these cases, in my humble judgment, were rightly decided."

In a case in this Division—*Guthrie* v. *Kinghorn*—in which *Craske* was cited, and which was decided before the case of *Plumb*, Lord Salvesen said this—"We would be opening the door very wide 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 of course accept the law as laid down in *Craske* and as adopted in the House of Lords, and it seems to me that the result of that is that the interpretation of these words "out of the employment" has been finally determined to mean that the accident must have arisen because of the nature of the employment in which the injured person was engaged at the time. I think there was nothing of that sort here. The accident arose from nothing whatever connected with the respondent's employment, but from something outside altogether. No doubt the fact is that she was engaged in this workshop at the particular time when the roof fell and injured her, but that is exactly the point which Lord Salvesen deals with in the passage I have read. Accordingly I am of opinion that the arbitrator has gone wrong here, and that we should answer the question in the negative.

I think it is very possible that the Sheriff-Substitute has misdirected himself, as Lord Dundas suggested in the course of the argument, by misinterpreting what was decided in the case of *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 682, 52 S.L.R. 612. In that case the House of Lords was very sharply divided, but the great bulk of the observations expressed by the noble and learned Lords related to the question whether there had been an accident at all, and in the course of his judgment Lord Loreburn delivered the passage which the arbitrator quotes in his note. But the point of that passage was not whether the accident had been caused by a very unlikely circumstance. The real point as it appears to me is found in these words—"It may happen and has happened, and it has happened because the poor man was a schoolmaster. The event has proved that it arose out of his employment." That was a view from which certain of the noble and learned Lords differed, but the majority accepted that view, and it is quite consistent with the opinions of the Master of the Rolls and Lord Justice Buckley

in the case of *Craske* and with that of Lord Dunedin in the case of *Plumb*. On none of the facts in this case could it be competently found that the personal injuries sustained by the respondent were caused by accident arising out of her employment.

LORD DUNDAS—I also think that we must answer this question in the negative. I do not consider that upon the facts proved it could competently be found that the injuries were caused by accident arising out of the employment. I think the learned arbitrator has misdirected himself in point of law. Of course the question must be solved by a consideration of the words of the Act of Parliament itself; but I agree with your Lordship in thinking that it is quite useful to bear in mind in arriving at our decision the well-known passage from the Master of the Rolls' judgment in *Craske* v. *Wigan*, [1909] 2 K.B. 635—a passage frequently cited judicially, and in particular approved by the House of Lords in the case of *Plumb*, [1914] A.C. 62. In that passage if one changes an "or" into an "and"—as we have the authority of the Master of the Rolls himself for doing (in *Mitchinson* v. *Day Brothers*, [1913] 1 K.B. 603)—it reads thus—'It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, *and* if I had not been in that particular place.' He must go further and must 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.'"

I do not doubt that the applicant here could say with truth that the accident would not have happened if she had not been engaged in that employment and if she had not been in that particular place. But that is not enough. Nor was it suggested that the accident arose because of anything that she was doing in the course of her employment.

Therefore one comes to consider whether she can bring herself within the last branch of the category laid down by the Master of the Rolls—namely, that the accident occurred because she was exposed by the nature of her employment to some peculiar danger. I think that we must answer that question in the negative. The danger of the wall falling had, so far as I see, nothing whatever to do with the nature of the employment. Anyone who had been within the range of the falling wall would equally have been injured whether he was a fish-worker or not.

With regard to the passage from the case of *Trim*, [1914] A.C. 682, I think it is possible, as your Lordship suggested, that it has contributed to the error into which the learned arbitrator has fallen in point of law. The gist of the passage clearly is this, that an accident may arise out of the employment although it is of a wholly unexpected and indeed unparalleled nature, but still in order to infer liability you must always be in a position to hold that it did arise out of the employment. That is really what Lord Loreburn points out when he says—"It may happen and has happened, and it has happened because the poor man was a schoolmaster. The event has proved that it arose out of his employment." It was plainly because the poor man was a schoolmaster that the pupils set upon him and did him to death. Whether the learned Sheriff did or did not misapply that case does not perhaps much matter, but the passage fits in very well with what I have been venturing to say, because if one applies the doctrine to this case it seems to me impossible to say that it was because the poor woman was a fish-worker that the accident befell her. The accident had nothing to do with the employment in the sense in which that word should be understood, namely, the nature of the employment in which she was engaged. It seems to me that the applicant can only say that the accident would not have happened if she had not been engaged in this employment and had not been in this particular place, and to say this is not enough.

LORD SALVESEN—I entirely concur. I think it is impossible to distinguish this case from the case of *Guthrie* v. *Kinghorn*, 1913 S.C. 1155, or at all events there is nothing in the circumstances disclosed in this stated case which prevents the application of the principles which were laid down in that case and in the previous case of *Craske*, [1909], 2 K.B. 635, which was there followed. This accident did not happen to the unfortunate woman who was injured because she was a fish-worker. It had nothing to do with her employment; it happened because at the time the brick wall fell she was within its range.

I agree with the argument advanced by Mr Moncrieff that the risk to which she fell a victim was a risk common to all people who happened to be in buildings which have dangerous surroundings. It is not a common or familiar risk; it is a very unusual risk, but a risk such as it is that arises from proximity to some unsubstantial structure, and every person is equally exposed to that risk who happens to be within range of the particular falling building. No doubt this accident would not have happened to the respondent if she had not been in this particular building, and she was there because it was the place where she was employed. But then we have the highest authority for holding that it is not enough to say that the accident happened in the building in which the injured person was employed. There must be something more. It must arise from the nature of the employment or from some special risk to which the employee was exposed in consequence of his or her employment.

The main argument that was addressed to us was founded upon the street accident cases. Now in all these cases the accident arose from the nature of the employment, to wit, the necessity of passing through streets where there was traffic, or where there might be traps in the shape of banana skins or the like upon the pavement. The difficulty I have in following these cases is not in reaching the result that the various

accidents arose out of the employment, but in understanding the nature of exceptions which has been recognised where the particular risk to which the employee was subjected was not more than what an ordinary person incurs in the daily walks of life. But, as I say, there is no difficulty in understanding the principle of the decisions where liability was affirmed, because in each case the accident arose out of the nature of the employment, while in this case I think it did not.

LORD GUTHRIE—Mr Patrick in his able argument admitted that any member of the public in this building at the time when the accident happened, or any employee employed at another kind of work, would have been exposed to the same risk as the respondent, but he based his case on the fact that she continued exposed to this risk in a way that a member of the public present at the time would not have been. It seems to me that, looking to the findings, we cannot say that there was a continuous exposure to any risk, because for aught that appears the risk might only have arisen a few seconds before the accident actually happened. But even if there was a continuous exposure to risk it is clear that the risk did not arise out of anything specially connected with the respondent's employment in this building as a fish-worker. I think Mr Moncrieff put the case on its proper basis when he said that the risk was said to arise from the employment, but it really arose from neighbourhood.

The Court answered the question of law in the negative.

Counsel for the Appellant—Moncrieff, K.C.—A. M. Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Anderson, K.C. — Patrick. Agent — T. M. Pole, Solicitor.

HOUSE OF LORDS.

Friday, October 29.

(Before Lord Atkinson, Lord Shaw, Lord Parker, and Lord Wrenbury.)

DONALDSON'S TRUSTEES *v.* DONALDSON'S EXECUTRIX.

Succession—Will—Vesting—Bequest subject to Trust Regulation which is not Exhaustive.

"It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be. Of course, as Lord Cottenham pointed out in *Lassence* v. *Tierney* (1 Mac. & G. 551) if the terms of the gift are ambiguous, you may seek assistance in construing it—in saying whether it is expressed as an absolute gift or not—from the other parts of the will, including the language of the engrafted trusts. But when the Court has once determined that the first gift is in terms absolute, then if it is a share of residue (as in the present case) the next-of-kin are excluded in any event"—*per* Lord Davey in *Hancock* v. *Watson*, [1902] A.C. 14, at p. 22.

Application of the principle to a Scotch case.

Robert Michael Donaldson, mining engineer, Glasgow, and another, trustees acting under the trust-disposition and settlement, with codicil and letter of instruction, of the deceased Robert Donaldson, iron merchant, Glasgow, *first parties;* Caroline Isobel Donaldson, executrix of the deceased Peter Donaldson, Woodbine, Kilcreggan, Dumbartonshire, who died unmarried on 23rd June 1913, with concurrence, *second party*, and others, being the other children of the said Robert Donaldson or the issue of deceased children, *third*, *fourth*, *fifth*, and *sixth parties*, presented a Special Case to determine what was the interest taken by the deceased Peter Donaldson in a one-third part of his share of the residue of the estate of his deceased father Robert Donaldson (the *testator*).

By his *trust-disposition and settlement* Robert Donaldson provided—"*In the sixth place* I direct my trustees to hold apply pay and convey the residue of my means and estate and the income thereof for behoof of my children and their issue who survive me and for the issue *per stirpes* of any daughter who has predeceased me as follows, viz.—(First) I direct them to set aside for each of my daughters the sum of Fifty thousand pounds but under deduction of such capital sum as I may have settled or undertaken to settle in her marriage settlement or contract or in any deed or document in connection with her marriage and I direct that daughters' provisions shall be held by my trustees or in their option the share of any married daughter shall be paid over to the trustees acting under her marriage settlement or contract to be held by them for behoof of my daughters respectively in liferent for their respective liferent alimentary use allenarly and for behoof of the issue of their respective bodies in fee and that in such proportions under such restrictions (including a restriction to a liferent) at such time or times and upon such terms and conditions as my said daughters may respectively appoint by any writing under her hand whether testamentary or otherwise and failing such appointment then equally between her children who survive her jointly with the issue of any child or children of her who may have predeceased her leaving issue *per stirpes* share and share alike and I provide and declare that in the event of any of my daughters predeceasing me leaving issue such issue shall be entitled equally amongst them to the share of my estate which would have been paid to or been settled upon their mother had she survived and I further pro-