Counsel for the Pursuer—Mackenzie, K.C. —Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Defenders—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Wednesday, February 21.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court of Aberdeen.

CAMPBELL *v.* FARQUHAR.

Poor—Poor's Roll—Process—Printing—Dispensing with Printing—Reporters on probabilis causa Equally Divided in Opinion.

An appellant from the Sheriff Court, who had against him a judgment of the Sheriff-Substitute and Sheriff, applied for admission to the poor's roll of the Court of Session in order to prosecute the appeal. Opinion of the reporters as to whether the pursuer had a *probabilis causa litigandi* was equally divided. *Held* that, notwithstanding this, the fact that the case turned upon the question of contributory negligence justified the Court in dispensing with printing.

George Campbell, *pursuer*, aged fifteen, residing with his mother Mrs Helen Fraser or Campbell, Aberdeen, brought an action in the Sheriff Court at Aberdeen against Arthur W. Farquhar, *defender*, to recover damages for personal injuries sustained in consequence of his being knocked down by a motor car belonging to the defender. The Sheriff-Substitute (LOUTTIT LAING) having assoilzied the defenders, and the Sheriff (LORIMER) having adhered, the pursuer appealed to the Court of Session.

Both the Sheriff-Substitute and the Sheriff found that there was negligence on the part of the defender, but that negligence on the part of the pursuer had contributed to the accident, the Sheriff intimating that on the question of contributory negligence the case was a narrow one.

On 30th November 1916 the pursuer applied for admission to the poor's roll of the Court of Session in order to be enabled to prosecute the appeal. The reporters on the *probabilis causa litigandi* reported that they were equally divided in opinion on the question whether the pursuer had a *probabilis causa litigandi*.

The defender enrolled the cause and moved the Court, in view of the reporters' report, to refuse the application and to order prints to be lodged within fourteen days.

The pursuer moved the Court to dispense with printing, and argued—Where as in the present case there were averments of serious injury, and the question turned on a fine point of law, the pursuer should be given an opportunity of laying his case before the Court. The fact that the reporters were equally divided in opinion strengthened this pursuer's position. Under the circumstances printing therefore should be dispensed with, and for this purpose a dispensation was necessary. In the case of *Walker* v. *Smith*, 1912 S.C. 1149, 49 S.L.R. 863, the pursuer was, no doubt, refused admission to the poor's roll, and was ordered to print where he had an adverse judgment of the Sheriff-Substitute and Sheriff to meet. In this case, however, serious injuries had undoubtedly been sustained and the question of law was narrow. Because of that a dispensation of printing was asked for.

LORD SALVESEN delivered the opinion of the Court:—I think this is a special case. If the reporters had been of opinion that there was no probable cause I should not have been for granting this request. But where the reporters are equally divided in opinion, and where the Sheriffs have indicated that there is proof of fault, and the matter turns on the question of contributory negligence, I think we have such special circumstances as would justify us in granting the request to dispense with printing.

The Court granted the request to dispense with printing.

Counsel for the Pursuer—R. Macgregor Mitchell. Agent—T. M. Pole, S.S.C.

Counsel for the Defender—D. R. Scott. Agents—Lindsay, Cook, & Dickson, W.S.

HOUSE OF LORDS.

Thursday, March 8.

(Before Viscount Haldane, Lord Kinnear, Lord Shaw, and Lord Parmoor.)

SIMPSON *v.* SINCLAIR.

(In the Court of Session, November 10, 1915, 53 S.L.R. 94, and 1916 S.C. 85.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Arising out of*"—*Fall of Wall on Adjoining Property upon Roof of Building where Workman Employed.*

A brick wall in course of erection on an adjoining property fell on to a building where fishcurers were employed at work. It brought down the roof of the building, the fishcurers were buried in the wreckage, and they suffered serious injuries. *Held* (*rev.* judgment of the Second Division) that the accident did arise out of the employment.

Per Lord Haldane—". . . if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment . . ., is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he

might just as readily have been struck while walking elsewhere off the farm. A further condition is required — the condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstances attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in."

Authorities reviewed.

The case is reported *ante ut supra.*

The employee, Mrs Margaret Thom or Simpson (respondent in the Court of Session), appealed to the House of Lords.

At delivering judgment (Lord Haldane, Lord Dunedin, and Lord Atkinson being present)—

VISCOUNT HALDANE—Lord Kinnear requests me to say that he concurs in the judgment which I am about to read.

In this case the question is whether the appellant, who was employed in packing herrings by the respondent, a fishcurer in Aberdeen, is entitled to recover compensation from him under the Workmen's Compensation Act 1906 for injury caused by accident. What happened was that a brick wall about 20 feet high, in course of erection on ground belonging to some-one else, but contiguous to the curing-shed of the respondent in which the appellant was employed, fell by reason of its instability on the shed. The consequence was that the roof of the shed and part of its wall tumbled in, and the appellant and other workers were buried under fallen material composed mainly of corrugated iron and rafters which belonged to the roof of the shed, and of bricks from the wall on the adjoining property. The Sheriff-Substitute of Aberdeen decided that the accident to the appellant arose "out of and in the course of the employment" within the meaning of the statute and awarded compensation for her injuries. But he stated a case so as to raise a question of law for the opinion of the Court. The Second Division, differing from his view of the law, reversed his decision, and hence this appeal.

It will, I think, be convenient in considering the question of law raised, which is one of construction of the words of the Act, to examine it in the first instance apart from authority, and then to see whether the decided cases, looked at in the light so obtained, admit of freedom in interpretation. This is the more expedient because the decided cases, as was established in the course of the able and elaborate arguments which were addressed to your Lordships from both sides of the bar, are not altogether in harmony. Under these circumstances I turn to the words in the statute on which the question depends. It will be observed that the Legislature has imposed a double condition for the liability of the employer for injury from accident—a condition that the injury must arise not only in the course of the employment but out of it. It is easy in a case like the present to determine the satisfaction of one of these conditions. The appellant was actually employed when the accident occurred, and she was obviously injured by an accident in the course of the employment. But did the accident arise out of the employment? As to the meaning of these words two contentions have been put forward.

According to one of them the language used is satisfied if injury has been inflicted on the workman by any accident, such as something falling on him, which would not have happened to him if his employment had not caused him to be in the place at which the accident occurred at the time of its occurrence, the place and time having thus been conditions of the result brought into existence by the employment. Once establish this, and it is said that no further causal connection need be sought.

I think that this interpretation is too vague. It would cover the case of a farm labourer struck by lightning while walking across a field in the farm on which he was employed. Yet he might just as readily have been struck while walking elsewhere off the farm. A further condition seems to be required—the condition that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of some special circumstance attending the employment of the workman there. His duty may have occasioned his being near a tree which attracted the lightning, or being under a roof which for some reason fell in.

According to the other contention a still fuller and more definite causal relation than this is essential. Unless, it is argued, the accident was due to something the man was doing in the course of his employment, or was exposed to as a peculiar danger by the nature of his employment, the conditions required by the statute are not fulfilled. This view of its requirements was adopted in the judgments of the Second Division in the present case, who thought that it derived countenance from expressions used by the Master of the Rolls in *Craske* v. *Wigan*, 1909, 2 K.B. 635, to which I will refer later on. The foundation of the argument is that the mere fact of a man being, by reason of the locality of his employment, in the place where an accident happens to him does not distinguish his case from that of mankind generally if the accident is one, such as a stroke by lightning, which might have happened to him as readily in some other spot as in the one where he was employed. In order that the accident may be truly said to have arisen out of the employment it is argued that the character of the employment must be shown to have actively contributed to its occurrence.

There are, no doubt, many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof, and that

roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment, which is required by the words "arising out of." Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If therefore the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one—Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged.

The expression "cause" is almost invariably used in a way which lacks precision. In strict logic the cause cannot be pronounced to be less than the sum of the entire conditions. But in ordinary speech and practice we select some one or more out of what is an infinite number of conditions to be treated as the cause. From the practical standpoint of the man in the street the cause of the setting the house on fire was the striking of a match, while from that of the man of science it was the presence of all the conditions which enabled potential to be converted into kinetic energy. On the other hand, for the Court which tries a question of arson the cause is the intention of the accused and any deed done which has accomplished this intention. What, then, is the special point of view which the Workmen's Compensation Act of 1906 directs us to take in the practical selection of the circumstances which are to determine whether an event has arisen out of the employment which has amounted to injury by accident within the meaning of the Act? I think that the Court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established. For the reasons which I assigned in this House in *Trim Joint District School Board of Management* v. *Kelly*, [1914] A.C. 667, 52 S.L.R. 612,—reasons which I abstain from repeating—I am of opinion that the governing purpose of the statute makes it as irrelevant to look beyond the immediate cause of the accident for explanations or for remoter causes as it would be in a case arising on a policy of marine insurance, provided that the circumstances bring the immediate cause within the definition. Where the question is one of the construction of an obligation to insure against accident the law looks to the *proxima causa* of the accident as decisive and does not look behind it. If, therefore, the language in question were to be construed upon principle and apart from authorities I should be prepared to hold that it was satisfied where, as here, it has been established as a fact that it was as arising out of her employment that the appellant was under the roof by the falling in of which she was injured. Behind the fact that the roof fell we cannot go. The limiting words in the Act do not refer to any act of negligence on the part of the employer as to be looked for, but simply to a restriction of the class of accident against which he is to provide insurance. The appellant was injured because she happened at the moment of the accident to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the Act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighbouring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial in the light of this construction. It is enough that by the terms of her employment the appellant had to work in this particular shed and was in consequence injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment not the less if ultimately caused by the fall of some one else's wall than if it had been caused by inherent weakness of the employer's roof.

I turn now to the authorities to see what bearing they have on the construction of the statute. The first observation I must make is that decided cases afford less guidance than usual on such a question. The reason is that the appellate tribunals have consistently shown a proper reluctance to look beyond findings of fact by the arbitrator. This has been particularly so in the course of the decisions on the Act in your Lordships' House. *Couchman* v. *Warner*, [1912] A.C. 35, 49 S.L.R. 681, the frost-bite case, is an excellent illustration of this, and in consequence nothing that was said there is authority on which the appellant here can rely. After examining what has been decided in this House I have come to the conclusion that we are free on the present occasion, so far as decisions in this House are concerned, to construe the statute in the sense I have indicated. I wish particularly to say that in my view there is nothing in *Plumb* v. *The Cobden Flour Mills Company*, [1914] A.C. 62, 51 S.L.R. 861, which really touches the point here.

But in the Court of Session and in the

Court of Appeal in England opinions have occasionally been indicated which apparently militate against this construction, and if there had been anything like a uniform course of decisions to that effect I should naturally have hesitated before disturbing them. However on examining the authorities I find that they are far from harmonious. I deal with some of the more important.

Guthrie v. *Kinghorn*, 1913 S.C. 1155, 50 S.L.R. 861, was a case in which a carter in charge of a horse and lorry within his employer's yard was struck by a sheet of corrugated iron blown from the roof of an adjoining building. The Second Division of the Court of Session held that the case was not within the Act because what had happened was not an ordinary risk of the employment. I doubt whether this was right. But the decision, which proceeded on the narrower interpretation of the statute, was followed by the Second Division in the present case. It was thought to have proceeded on a principle believed to have been laid down in *Craske* v. *Wigan*, [1909] 2 K.B. 635, where the accident was caused by a cockchafer which flew in at an open window and so frightened a lady's maid, who was doing needlework for herself, that she threw back her hand and injured her eye. It was held that the mere fact that she was in her employer's house was not enough, for it did not really contribute to a risk which was common to humanity. That may well have been the correct interpretation of the facts. What the Master of the Rolls said as to its being necessary to say more than that "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," is quite true when referred to the facts with which he was dealing. When he adds that the claimant must say that "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 particular danger," that is also quite true as a criticism of the kind of claim that was before him. But I am not sure that the exposition of the Act by Buckley, L.J., is not unduly abstract, and in consequence apt to mislead in some of its language. He said that the words "out of" point to the origin and cause of the accident, and the words "in the course of" to the time, place, and circumstances under which the accident takes place. In saying this he adopted what he had previously said to the same effect in *Fitzgerald* v. *Clarke*, [1908] 2 K.B. 796. I doubt whether the time, place, and circumstances can properly be so sharply distinguished from other conditions which are described as belonging to the origin and cause as these words suggest. *Mitchinson* v. *Day Brothers*, [1913] 1 K.B. 603, is I think a more doubtful case. There a carter in charge of a horse and van was murderously assaulted, and it was held that the risk of being attacked by a man who was drunk did not arise reasonably out of the employment. In any view the facts differ from those in the present case, but I am not sure that the interpretation of the Act was not too narrow. In *Martin* v. *Lovibond*, [1914] 2 K.B. 227, a brewer's drayman who was driving the dray in the course of his employment, left his dray to get a glass of beer and in returning was knocked down by a motor car. His dependants were held entitled to claim. The Court of Appeal held that what had happened arose out of and in the course of his employment. The case shows how far the Courts have sometimes gone in the direction of the wider interpretation of which I have spoken. *Wicks* v. *Dowell*, [1905] 2 K.B. 225, was the case of a workman employed in unloading coal from a ship who had to stand by the open hatchway through which the coal was being brought up from the hold. He was seized with an epileptic fit while so engaged and fell into the hold and was injured. Collins, M.R., and the Court of Appeal held that the *causa proxima* of the accident was his necessary nearness to the open hatchway, and following the principle of the marine insurance cases to which I have already referred, held that in interpreting the Act this, the *causa proxima*, and not the idiopathic condition of the person injured, was to be looked to.

I think that the main current of authority in the Court of Appeal in this country does not militate against the view taken by Collins, M.R., and in the Court of Session it seems to me that the weight of authority is in its favour, and against what has been argued for by the respondent here. In *Millar* v. *The Refuge Assurance Company*, 1912 S.C. 37, 49 S.L.R. 67, a collector for the company had fallen down a stair which he had to use while seeking to collect a premium. Lord President Dunedin and Lord Kinnear agreed in holding the company liable. The latter said that a risk was specially connected with a man's employment if it was due to the particular place where his employment required him to be at the time. *Adamson* v. *Anderson*, 1913 S.C. 1038, 50 S.L.R. 855, is a decision of the First Division recognising this construction, and so I think are the decisions in *Hughes* v. *Bett*, 1915, S.C. 150, 52 S.L.R. 93, and *Nicol* v. *Young's Paraffin Light Company*, 1915 S.C. 439, 52 S.L.R. 354. *White* v. *Avery*, 1916 S.C. 209, 53 S.L.R. 122, proceeds on the same principle, and so as it appears to me does the earlier case of *M'Neice* v. *The Singer Sewing Machine Company*, 1911 S.C. 12, 48 S.L.R. 15.

It is not necessary to proceed further in the examination of the authorities, for those to which I have referred show that there is no such uniform exposition of this very recent statute as precludes this House from feeling itself free, if it should be so disposed, to give effect to the construction which I am suggesting. For this construction decided cases disclose indeed a great deal of support.

In the result I move your Lordships that the judgment appealed from be reversed and that of the Sheriff-Substitute restored, and that the appellant should have such

costs in this House and in the Courts below as are consistent with her appearance here *in forma pauperis.*

LORD SHAW—[*Read by Lord Atkinson*]—The question which arises in this case is somewhat narrow, but I have had little hesitation in agreeing with your Lordships upon it. There have been many cases dealing with the consideration of those words in the Workmen's Compensation Act, namely, "arising out of the employment." The criticism is, of course, correct that those words must be taken to signify something more in the sense of limitation than "in the course of" the employment, and that both of those expressions of condition must be satisfied before the Act can apply. The decided cases are numerous and the dicta therein cannot always be reconciled, but a further consideration of the language of the statute itself—to which language one must go as the absolute test of liability—has confirmed my view that the decision pronounced by the learned Sheriff-Substitute was correct.

On the 26th January 1915 the appellant, who was then a fish-worker in the employment of the respondent, a fish-curer, was engaged in packing herrings into boxes. The work had to be performed in a brick shed, 7 feet high, roofed with corrugated iron and lit by obscure windows in the roof. The appellant was accordingly obliged, as part of the conditions of her service, to be within the shed when engaged in her work and to be there at the time when the accident occurred. The accident itself was caused by reason of the collapse of a brick wall, 20 feet high. This was being erected on an adjacent building, and it fell upon the roof of the shed where the appellant was working, bringing down the roof and part of the working shed, so that the appellant and other workers were buried under the wreckage—three of them were killed, and six others, of whom the appellant was one, were injured.

The learned Sheriff-Substitute found that the conditions of the appellant's employment "obliged her to work where she was and exposed her to the risk of said accident." As a statement of fact this of course cannot be denied, but the respondent's argument before this House is that no liability is imposed under the statute, because such a situation is not covered by the words "arising out of the employment" where these words are properly construed. The main argument relied upon—the argument being successful in the Second Division of the Court of Session—was that the words of the Act "arising out of the employment" should be construed to mean "arising out of the nature of the employment." And a further construction is maintained to be correct, viz., that the words not only mean "the nature of the employment" in general, but the nature of the injured servant's employment. For myself I cannot so narrow the statutory words either in the general or in the particular sense.

The test applied by the learned Master of the Rolls, Lord Cozens-Hardy, in the case of *Craske*, and referred to by the learned Judges as an inviolable rule, is 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.'" This dictum has been given effect to in its full extent by the learned Judges in the Court below. The Lord Justice-Clerk observes "it seems to me that the accident must have arisen because of the nature of the employment in which the injured person was engaged at the time." Lord Dundas puts the point with much clearness in application to the present case when he says, "it seems to me impossible to say that it was because the poor woman was a fish-curer that the accident befell her." And the other learned Lords decide upon the same ground.

With much respect to the learned Judges I am unable to agree in such a limitation upon the words of the Act of Parliament. When a miner is engaged to hew coal, and in the course of his work brings down upon himself a mass of superincumbent material, it is plain that such a case would fall within the limited construction just cited. But such a case is comparatively rare. I ask myself what would result under the statute in those infinitely more numerous cases of accident to underground workers the specific nature of whose employment was, for instance, not in actual excavation, but merely in the haulage of the coal or the lighting or watching of the pit. Accidents arise, not from anything in the nature of the particular miner's work, but possibly from causes, say subsidence, fires, or escapes of gas taking their origin it may be miles away, communicating along the strata of the earth and in no way causally connected with the particular workman's job. I think, accordingly, that the statute is not satisfied by asking the question as to whether the nature of the employment of the injured person had any causal relation to the accident, because it is clear that in very many instances the accident arose out of the employment as such, apart from the particular nature of the service which the injured workman had to render. When in fact the statute uses the words "arising out of the employment," it refers, in the first place at least, not to the individual's particular service.

It follows from that that there may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea with a special exposure to the dangers relative to such elements, or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to figure injuries

by accident in the course of and arising out of the employment which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which without any doubt sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger. In short, my view of the statute is that the expression "arising out of the employment" is not confined to the mere "nature of the employment." The expression in my opinion applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute "arising out of the employment" apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb* and *Barnes* in this House, then a case for compensation under the statute appears to arise.

It is said in the present case that the injury by accident arose not because of the nature of the employment, which was packing herrings, and if decisions and dicta such as those above cited to the effect that the statutory words "the employment' can only be satisfied by "the nature of the employment" this is conclusive. But upon the other hand it is quite plain that it was part of the conditions of the appellant's labour and part of the obligations which she undertook as a servant of the respondent that she should at the time of the accident occupy this particular place of work which turned out to be a place of special danger. Her service there and not anywhere else brought her into the position of being subjected to this peril. It was not a peril which might fall upon the public at large, such as the severity of the weather, as in *Warner* v. *Couchman* and *Karemaker* v. *The Owners of the "Corsican,"* 4 Butterworth 295, but it was a peril attached to the particular location in which by the obligation of service the appellant was placed. In my humble opinion this latter case falls within the Act upon a sound construction of its terms.

I am glad to be fortified in this view by a large body of decided cases. In *Morgan* v. *Zenada*, 2 Butterworth 19, where a seaman painting the outside of his ship in Mexican waters, and receiving from his position at work the force both of the direct and reflected rays of the sun, underwent sunstroke, he was held entitled to recover under the Act. In *Davis* v. *Gillespie*, 105 L.T. 494—also a case of sunstroke—liability attached because the workman was placed by the conditions of his work within a zone of special danger, viz., for some hours on a blackened steel deck under the blazing sun of Hayti. In *Miller* v. *Refuge Assurance Company*, an assurance company's collector engaged in collecting premiums was injured in a stair to which he had by the obligations of his service to go; in *M'Neice* v. *Singer Company*, an accident overtook a salesman who was cycling in the course of his duty in a public street. In both of these cases liability was held to attach to the employer, and for the same reason, viz., that it was part of the obligations of the service that the workman was placed within the zone of special danger. I venture to give my particular adhesion to the opinion delivered by my noble and learned friend Lord Kinnear in the former of these cases. In *Andrew* v. *Hailsworth Industrial Society*, [1904] 2 K.B. 32—a lightning case—the position in which the man was doing the work and the place he had necessarily to occupy was a position and a place of special danger and so the Act was held to apply. In *Pierce* v. *Provident Company*, [1911] 1 K.B. 1002, a street accident to a collector on a bicycle, the Scotch case of *M'Neice*, just referred to, was followed. In *Brown* v. *John Watson, Ltd.*, [1915] A.C. 1, 51 S.L.R. 492, this House, reversing the Second Division of the Court of Session, held that a workman having been by the conditions of his service placed in a position of danger from extreme chill, causing pneumonia and death, there was liability under the Act. In *Martin* v. *Lovibond* the same decision was given as in the analogous street cases of *M'Neice* and *Pierce*.

The cases above cited, nine in number, are in truth all what might be termed "location" cases, and although there is much variety of expression by the learned Judges I think that they form a body of authority in support of the construction of the statute which your Lordships are now sanctioning. In each and all it was because of the nature, conditions, obligations, or incidents of the employment by which the workman was brought within the zone of special danger that injury by accident was pronounced to have arisen out of the employment.

In conclusion I desire to say that the case of *Guthrie* is inconsistent with these decisions and with the present judgment and cannot be supported.

LORD PARMOOR—[*Read by Lord Dunedin*]—The facts in this case are not in dispute. The appellant, who was a fish-worker in the employment of the respondent, was engaged in packing kippered herrings into boxes in a shed belonging to the respondent which had brick walls 7 feet high, a roof of corrugated iron, and was lit by obscured windows in the roof. Between 10 and 11 on the morning of 26th January 1915, when the appellant was so engaged, a brick wall about 20 feet high, and in the course of erection close to the respondent's property, fell, by reason of its own instability, on the shed, bringing down the roof and part of the wall and burying the appellant under the wreckage. The appellant received injuries so serious that she was rendered totally incapable for work. The Sheriff-Substitute found "that the conditions of the appellant's employment obliged her to work where she was, and exposed her to the risk of the said accident," and held that the accident to the appellant arose out of and in the course of her employment. The

question of law to be determined is whether upon the facts it was competent for the Sheriff-Substitute to find that the injuries sustained by the appellant were caused by accident arising out of her employment within the meaning of the Workmen's Compensation Act 1906. The Second Division of the Court of Session have answered this question in the negative, and it is against this decision that the appeal is brought before your Lordships.

Apart from authority, it appears to me to be reasonably clear, and in accordance with the ordinary natural meaning of the language of the statute, to hold that if the conditions of his employment oblige a workman to work in a particular building or position which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, such accident arises out of his employment as incident not to the character of the work but to the dangers and risks of the particular building or position in which by the conditions of his employment he is obliged to work. The Workmen's Compensation Act connotes no distinction between such dangers and risks and dangers and risks incident to the plant required in the employment, or to the particular machine at which the workman may be engaged at the time of the accident. In either case the workman is subjected to an accident which arises out of his employment. Mr Moncrieff in his able argument suggested a distinction between inherent defects in a building and wreckage caused by the outside carelessness of some third party. This consideration appears to me to have no weight under the insurance principle of the Workmen's Compensation Act, in which compensation is not dependent in any way on the conduct or negligence of the employer. It was further argued that all mankind were subject to the risk of a falling wall in the proximity of new buildings, and that this consideration negatived the suggestion that the accident arose out of the employment, although the Sheriff-Substitute had found that the appellant was obliged under the conditions of her employment to work in this particular shed which was wrecked by the fall of an adjoining wall.

I am unable to assent to this argument. The fact that the risk may be common to all mankind does not disentitle a workman to compensation if in the particular case it arises out of the employment. Any stranger walking along a road in a mine may be exposed to the risk of an accidental fall of coal, but this does not affect the claim of a miner who in the course of his duty or to obtain access to his work is unfortunately injured by such fall. It is, no doubt, not sufficient merely to allege that the accident could not have happened if the appellant had not been in the particular shed, but this is not the case made on behalf of the respondent, and would be inconsistent with the findings of fact by the Sheriff-Substitute.

A large number of cases were cited to their Lordships during the argument, but it is not necessary to refer to them further after the exhaustive review in the opinion of Viscount Haldane, and I propose only to refer to the cases on which the Lord Justice-Clerk relies in support of his judgment.

In *Craske* v. *Wigan* it was held that it was 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." I do not think that the present appeal necessitates any departure from this principle. The Master of the Rolls then adds, the applicant 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." The words "nature of the employment" do not occur in this part of the statute, but it is unnecessary to raise any matter of mere verbal criticism. In my opinion if the conditions of the workman's employment oblige him to work in a particular building and thereby expose him to the risk of the accident which has happened, this may be described as a peculiar danger to which from the nature of the employment the workman is exposed. I think, however, that it is preferable to adopt the actual words of the statute in testing their applicability to the facts of a particular case.

In the case of *Plumb* v. *Cobden Flour Mills Company*, decided in this House, Lord Dunedin says—"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"; and adds—"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." A risk may be accentuated by the incidents of the employment when the conditions of the employment oblige the work to be carried on in a particular building which exposes the workman to the risk of accident which in fact has occurred. An example of the application of this principle is found in the case of *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K.B. 32, which is approved in the opinion of Lord Dunedin. Sir R. Henn Collins, Master of the Rolls, says—"Though the accident may not be connected with or have any relation to the work a man is doing, yet if in point of fact the position in which the man was doing the work, and the place he must necessarily occupy while doing the work, are a position and place of danger which caused the accident, it may fairly be said that it arose out of the employment, not because of the work but because of the position"—*cf.* *Martin* v. *Lovibond*. The only other case decided in this House to which the Lord Justice-Clerk refers is *Trim Joint District School Board of Management* v. *Kelly*, but this is not a case which can be quoted to support the contention of the respondent.

In my opinion the appeal should be allowed with costs.

LORD KINNEAR concurred.

Their Lordships sustained the appeal and restored the judgment of the Sheriff-Substitute.

Counsel for Appellant—Douglas Knocker—Duffes. Agents—T. M. Pole, Solicitor, Edinburgh—John Cuthbert, London.

Counsel for Respondent—Moncrieff, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C., Edinburgh—R. S. Taylor, Son, & Humbert, London.

COURT OF SESSION.

Friday, February 9.

FIRST DIVISION.

[Lord Hunter, Ordinary.

PENDER-SMALL *v.* KINLOCH'S TRUSTEES.

Contract—Sale—Property—Sale of Heritage—Error—One Contract or Two—Remedy.

An annuity of £50 payable to the Free Church of Scotland "so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland" was constituted a real burden upon the lands of B by heritable bond of annuity. While the Churches' litigation was *sub judice* the lands were sold. The price was £7000, but of that only £5333, 6s. 8d. was to be paid in cash. The balance, which was the capitalised value of the annuity, was to be liquidated by the buyer taking the lands under burden of the annuity. Thereafter the Churches' case was decided, and as a result of the decision there ceased to be a church in Glenisla parish in connection with the Free Church of Scotland. In an action brought against the buyer, founding on mutual error, and concluding for decree that the annuity had lapsed, and that the buyer was liable in repayment of the balance of the £7000, *held* (*rev.* Lord Hunter) that (1) the contract was one and indivisible, and the arrangement as to the annuity was not a separate and severable contract; (2) the remedy sought was inappropriate, (*per* the Lord President, Lord Johnston, and Lord Mackenzie) because it amounted to re-formation of the contract, not recission thereof; (*per* Lord Skerrington), because it amounted to a reduction in part of an indivisible contract; (3) (*per* the Lord President and Lord Johnston) there was no essential error, the contract being one in which each party took the risk of the decision in the Churches' case; (4) (*per* Lord Johnston) the action was incompetent in respect that *esto* the pursuer could succeed, the defender's title to the property could not be effectively cleared of the burden as the creditors therein were not parties to the action.

John Stewart Menzies Pender-Small of Dirnanean, with consent and concurrence of James Stewart Robertson and another, testamentary trustees of the late James Small of Dirnanean, *pursuer*, brought an action against (1) William Joseph Starkey Barber-Starkey of Aldenham Park, Shropshire, and another, marriage-contract trustees of Sir John and Lady Kinloch, *defenders*, and (2), for any interest they might have, the Free Church of Scotland and others, and also (3), for any interest they might have, the General Trustees of the United Free Church of Scotland, concluding for decree that "(first) it ought and should be found and declared by decree of the Lords of our Council and Session that the real burden created on all and whole these four-sixth parts of the lands of Bellaty, one of which is commonly called Wester Neids, . . . as also all and whole that other sixth part of the lands of Bellaty . . . of old within the barony of Glenisla and now within the barony of Lundie, parish of Glenisla and sheriffdom of Forfar, by a heritable bond of annuity by the trustees of the late Thomas Rattray, dated 10th May and recorded in the General Register of Sasines 19th December 1866, for payment of the sum of £50 sterling yearly on the 15th day of March in each year to the treasurer for the time to the association in the parish of Glenisla in connection with the congregation of the Free Church of Scotland in Glenisla, to be by the said treasurer paid to John MacDonald, Esquire, general treasurer of the Free Church of Scotland, or to the general treasurer of the Free Church of Scotland for the time of the Sustentation Committee of the General Assembly of the Free Church of Scotland, so long as there shall be a church in Glenisla parish in connection with the Free Church of Scotland, had already lapsed as at 11th November 1903, and has lapsed and ceased to be effectual or exigible to any extent in all time coming; and (second) that the said defenders William Joseph Starkey Barber-Starkey and Archibald Hamilton Donald, as trustees foresaid, ought and should be found liable, by decree of our said Lords, to pay to the pursuer the sum of £1666, 13s. 4d. sterling, with the legal interest thereon from 11th November 1903 until payment."

The *facts* of the case were—The late Thomas Rattray, proprietor of the lands of Bellaty in the county of Forfar, died in 1856, leaving a codicil to his trust-disposition and settlement in the following terms:—"I specially declare that the annuity of £50 bequeathed to the Sustentation Fund of the Free Church of Scotland in Glenisla shall not be postponed, but that payment thereof shall be made by my trustees to the treasurer for the time to the association in the parish of Glenisla in connection with the congregation of the Free Church of Scotland in Glenisla, to be by the said treasurer paid to John MacDonald, Esquire, general treasurer to the Free Church of Scotland, or to the general treasurer of the Free Church of Scotland for the time of the Sustentation Committee of the General Assembly of the Free Church of Scotland; and I declare that