Saturday, June 6.

SECOND DIVISION.

[Sheriff Court at Leith.

CRAIG *v.* S.S. "CALABRIA" (OWNERS OF).

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

A seaman employed on a ship in port had liberty to go ashore, but he always slept on board. He went ashore after work was over, partly for the purpose of seeing the town and partly for the purpose of providing his own food. On returning to the ship it was necessary for him to walk along the quay in a passage formed by a row of barrels placed about two feet from the edge of the quay, in order to reach a gangway which was the only access to the ship. While in the passage and near to the gangway he stumbled and fell into the water and was drowned.

Held that there was evidence to warrant the Sheriff's finding that the accident did not arise out of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Mrs Craig, the widow of John Craig, Leith, as an individual, and as tutor for her pupil children, *appellant*, and James Cormack and others, the registered owners of the s.s. "Calabria" of Leith, *respondents*, the Sheriff-Substitute (GUY) refused compensation and stated a Case for appeal.

The Case stated:—"This is an arbitration in which the appellant, the widow of the deceased John Craig, claimed for herself and her pupil children, from the respondents as employers of the said deceased, compensation under the Workmen's Compensation Act 1906 in respect of his death.

"The following *facts* were admitted or proved:—The appellant is the widow of the deceased John Craig, and John Craig, James Craig, Thomas Craig, and Christina Craig are the pupil children of her marriage with the said deceased John Craig. On 9th September 1913 the said John Craig was in the employment of the respondents as a marine donkeyman on board their steamship "Calabria," then lying at the port of Riga. He was engaged for six months from 29th August 1913, subject to dismissal on 24 hours' notice. It was part of the said John Craig's contract, as well as of the other seamen's contracts, that they had to provide their own food and necessaries for the voyage, which they provided for themselves either before the voyage began or on shore when the vessel was in port. When the vessel was in port, and after working hours (which were usually from 7 a.m. till 5 p.m.) were over, unless the members of the crew had special instructions to the contrary, their time was at their own disposal, and they were at liberty to go ashore for the purpose of providing food and necessaries, or for their own private purposes. When the vessel was in port the men had their usual lodging on board, though they were only bound to be at their work when in port at 7 a.m. The deceased John Craig prior to his death had always slept on board the vessel. On said date, between 6 and 7 p.m., Craig left the ship and went ashore, partly for the purpose of procuring provisions and partly for the purpose of seeing the town. In the course of returning to the vessel between 10 and 11 p.m. of said date, and before he had reached the gangway between the quay and the vessel, he accidentally stumbled and fell into the water between the quay and the vessel, and was drowned. On the occasion in question the gangway from the vessel to the quay, and which was the only access to and from the vessel, was placed amidships. Opposite the gangway, and extending about fifty or sixty feet in each direction, there was a row of barrels situated about two feet from the edge of the quay, making it necessary for the crew in leaving the vessel to proceed along this passage at the edge of the quay fifty or sixty feet in either direction till they came to an opening left in the row of barrels to afford a means of passage over the remainder of the quay and thence to the town. It was thus also necessary for them on returning to the ship to walk along the said passage between the barrels and the edge of the quay, a distance of fifty or sixty feet. On the occasion of the accident Craig was returning to the vessel with three other members of the crew, and he was about twelve feet from the gangway when he accidentally stumbled and fell into the water as aforesaid, and was drowned.

"In these circumstances I found that the said accident did not arise either out of or in the course of the deceased's employment with the respondents.

"I therefore assoilzied the respondents, and found the appellant liable to the respondents in expenses."

The *question of law* for the opinion of the Court was—"Did the said accident arise out of and in the course of the employment of the said deceased John Craig with the respondents."

Argued for the appellant—The findings by the Sheriff showed that the accident necessarily arose in the course of the employment—*Moore* v. *Manchester Liners, Limited*, [1909] 1 K.B. 417, *per* Fletcher Moulton, L.J., at 421, *rev.* [1910] A.C. 498, *per* Loreburn, L.C., at 499; *Kitchenham* v. *S.S. "Johannesburg" Owners of*), [1911] 1 K.B. 523, *per* Fletcher Moulton, L.J., at 526, *aff.* [1911] A.C. 417. The accident arose out of the employment—*Leach* v. *Oakley, Street, & Company*, [1911] 1 K.B. 523; *Gane* v. *Norton Hill Colliery Company*, [1909] 2 K.B. 539; *Robertson* v. *Allan Brothers (Liverpool and London), Limited*, 1908, 1 B.W.C.C. 172. [LORD SALVESEN referred to *Jackson* v. *General Steam Fishing Company, Limited*, 1909 S.C. (H.L.) 37, 46 S.L.R. 901.]

Argued for the respondents—The Sheriff was entitled to find that the accident did

not arise out of the employment—*Webber* v. *Wansbrough Paper Company, Limited*, 1913, 6 B.W.C.C. 583; *Cook* v. *S.S. "Montreal"* (*Owners of*), 1913, 6 B.W.C.C. 220; *Mitchell* v. *S.S. "Saxon"* (*Owners of*), 1912, 5 B.W.C.C. 623; *Dixon* v. *S.S. "Ambient"* (*Owners of*), 1912, 5 B.W.C.C. 428; *Biggart* v. *S.S. "Minnesota"* (*Owners of*), 1911, 5 B.W.C.C. 68; *Fletcher* v. *"Duchess"* (*Owners of Ship*), [1911] A.C. 671; *Kitchenham* v. *S.S. Johannesburg* (*cit.*); *Moore* v. *Manchester Liners, Limited* (*cit.*); *Gilbert* v. *"Nizam"* (*Owners of Steam Trawler*), [1910] 2 K.B. 555; *Anderson* v. *Fife Coal Company, Limited*, 1910 S.C. 8, 47 S.L.R. 3; *Jackson* v. *General Steam Fishing Company, Limited* (*cit.*), *per* Lord Ashbourne at 1909 S.C. (H.L.) 37, 46 S.L.R. 901. The possibility figured by Fletcher Moulton, L.J., in *Kitchenham* v. *S.S. "Johannesburg"* (*Owners of*), (*cit.*), at [1911] 1 K.B. 528, was the very thing which might have happened in the present case according to the Sheriff's findings.

At advising—

LORD DUNDAS—The Stated Case sets forth the facts admitted or proved, and I need not repeat them. The respondents' counsel conceded at our bar that in view of some of the decided cases they could not maintain that the accident did not arise in the course of the deceased's employment. The question therefore is narrowed to whether or not the arbitrator was warranted by the facts in deciding that the accident did not arise out of the employment. My opinion is that he was so warranted. The facts disclose that the deceased was about twelve feet from the gangway when he stumbled and fell into the water. He was at the time returning to his ship, *ex concessis*, in the course of his employment, but I am unable to see that his mishap arose in any way out of his employment. I think it arose from a risk common to everyone, namely, that of falling from the edge of a quay into water. It is not enough for the applicant to say that the accident would not have happened if the man had not been engaged in the particular employment, or if he had not been at that particular place; she must show that it was in some way specially connected with his work and employment. I think the case would have been materially different if at the time of the accident the man had reached the gangway and fallen off it into the water, and the risk was one due to the means of access to the ship. The appellant's counsel founded strongly upon some passages in the opinion of Lord Moulton (then L.J.) in *Kitchenham's* case, [1911] 1 K.B. 523, at p. 527; but I do not think they avail him much when the opinion is read as a whole and having due regard to the facts of the case. It is true that the learned judge in the course of some general observations said he did not think the dividing line is when the man actually touches the ship or the special means of access to it. He instanced as a case of that kind where the accident might be held to arise out of the employment—one where a sailor returning to his ship in a dense fog, and trying to find the gangway (which his Lordship supposed to be unlighted), falls into the water and is drowned; but went on to say—"But if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment." Now in *Kitchenham's* case there was no evidence to show whether or not the deceased had reached the gangway when he fell into the water. Lord Moulton, on the facts, concluded that the man had not reached it, and said that the evidence was "not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf"; that it "falls short of what is necessary," and "though one may think it possible, and even probable, that he was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case." The widow's application therefore failed in *Kitchenham's* case, and the judgment was affirmed by the House of Lords, [1911] A.C. 417, while the decision was different in *Leach's* case, [1911] 1 K.B, 523, which the Court of Appeal disposed of at the same time—where the deceased had arrived at and passed on to the gangway when the accident occurred. It seems clear, therefore, that in these cases, as in many of the others cited to us, the question whether the deceased had or had not reached the gangway, or other means of access to the ship, was regarded by the Court as a material, if not crucial, one; and I do not think there is anything to the contrary in Lord Moulton's general observations when they are read along with the reasons assigned by his Lordship for the disposal of the two cases then before him. Indeed, I apprehend that Lord Moulton would have decided *Kitchenham's* case in the opposite sense if it had been proved, as it was in *Leach's* case, that the death was due to the means of access to the ship. I rather think that in all the cases in which an accident of this sort has been held to have arisen out of the employment, the deceased had reached the ship or the gangway, or other means of access to it, when the accident occurred. Now in the present case the man stumbled and fell before he got nearer than about twelve feet to the gangway. I do not think he had "taken any specific step towards getting on board the vessel," or was doing anything "specifically connected with his employment on the ship." He fell into the water from the passage-way on the quayside. The passage-way was narrowed to a width of two feet by a row of barrels, but there is no suggestion that the shipowners were in any way responsible for the presence of these barrels on the quay. The narrow passage-way cannot therefore be regarded as if it were a special mode of access to the ship provided by the employers. It appears

to me that the accident might have happened to any man who chanced to be walking along that quayside, and was not specifically connected with or incidental to the employment of the deceased.

We ought, in my judgment, to answer the question put to us by finding that it was conceded by the respondents' counsel that the accident arose in the course of the employment, but that there was evidence to warrant the arbitrator's finding that it did not arise out of the said employment, and that he rightly assoilzied the respondents.

LORD SALVESEN—In this case the Sheriff-Substitute has found that the accident to the late John Craig did not arise either in the course of or out of the deceased's employment. As regards the first matter, I think he has not had sufficient regard to the decisions of the House of Lords in the cases of *Moore*, [1910] A.C. 498, and *Kitchenham*, [1911] A.C. 417. It was settled by these two cases that a seaman who goes on shore for his own purposes, but with the assent, express or implied, of his employers, continues in his employment, so that if he meets with an accident while he is on shore and before he reaches his employer's premises, that accident arises in the course of his employment but not necessarily out of it.

The question whether the deceased workman in this case met with an accident arising out of his employment appears to me to be settled in the negative by the same two authorities. He was returning to his ship, but had not reached the gangway, when he accidentally stumbled and fell into the water between the quay and the vessel. Had he reached the gangway the case would have been ruled by the decision in *Leach*, [1911] 1 K.B. 523. The gangway was the access provided from the quay to the ship, and formed part of the employer's premises. The danger which attends a seaman crossing it is a risk arising out of his employment. It is not one to which the general public are exposed. On the other hand, the risk of falling from a quay is common to everyone, and is not therefore connected with the seaman's employment—*Fletcher*, [1911] A.C. 671. It is, in my opinion, nothing to the purpose that the quay along which the deceased had to pass was obstructed by cargo so that there was only a clear passage of two feet along the edge of it; nor is it of any consequence that it was necessary for the seaman to traverse this route in order to get back to his work. There is no finding that the shipowners were in any way responsible for the condition of the quay, or even that it was cargo from their vessel which was stored upon it. It is the port authority and not the shipowner who is responsible for the safety of the docks and quays. The accident might just as easily have occurred through the man's stumbling over a mooring rope stretching between a ship and the quay. All such risks are risks which the seaman takes when he is on shore for his own purposes, and do not arise out of his employment.

It was indeed suggested that as this man went ashore to provide himself with food and necessaries for the voyage under a contract with his employers that he was to provide his own food while at sea he was engaged on his employers' business. I think it would be as reasonable to say that when a man goes to his home to sleep or to have his dinner he is on his master's business, because unless he takes necessary food and rest he will be unable to do his work. The answer is, that he is taking food or rest, as the case may be, for his own purposes, and in order to enable him to fulfil his contract with his employer. I have no difficulty, therefore, in rejecting this argument.

LORD GUTHRIE—I am of the same opinion. The Sheriff-Substitute's findings clearly show that the case does not raise the difficult questions which have to be dealt with when an employee is injured away from his master's premises or the accesses to them, whether on land or water, but on his master's business. Craig was on what the law considers his own business, even although part of it consisted in procuring provisions (it might have been clothing) for his use on board ship. Nor does any question of fact arise on the case as stated as to whether the narrowed quay, along which Craig had to walk in order to reach the gangway, might not be fairly treated as a continuation of the gangway. There is nothing in the case to suggest that those on board Craig's ship had anything to do with the operations which resulted in the quay being so narrowed, or that the narrowed quay led only to Craig's ship, or that the narrowed space stopped at Craig's ship.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Answer the question of law therein stated by finding that it was conceded by the respondents' counsel that the accident referred to in the case arose in the course of the deceased John Craig's employment, but that there was evidence to warrant the arbitrator's finding that it did not arise out of the said employment: Therefore affirm the award of the arbitrator, and decern. . . ."

Counsel for the Appellant—Christie, K.C.—King Murray. Agent—T. M. Pole, Solicitor.

Counsel for the Respondents—Horne, K.C.—Normand. Agents—Boyd, Jameson, & Young, W.S.