in the course of his employment. I doubt very much whether it arose in the course of the employment, but to my mind it certainly did not arise out of the employment. We had the usual citation of authority, but I do not think that any of the cases quoted to us justify the conclusion arrived at by the learned arbitrator.

I should only like to add that in my view the latter half of the 8th finding and the whole of the 9th should not have been included by the arbitrator among the facts which were established. The latter part of the 8th finding is that the boy acted for a purpose which was incidental to his employment. That is not a finding of fact. Still less is the 9th finding "That the said injury was sustained by accident arising out of and in the course of his employment." If that were a finding in fact it would of course be conclusive. But it has been pointed out again and again that a finding in that form is not a finding of fact but either of law or of mixed fact and law; and for that one need go no further than to the opinion of Lord Kinnear in the case of *M'Lauchlan*, on which the learned arbitrator relies.

On the whole matter I think we must answer the question in the negative, for the reasons which your lordship has stated.

LORD SALVESEN—I agree, and I associate myself with what Lord Dundas has said with regard to the last half of the 8th and the whole of the 9th findings, which are clearly not findings in fact and must be treated as findings in law.

This is a very plain case. Mr Macdonald argued, as I understood him, that whatever a boy may naturally do during working hours in or near his employers' premises must be taken to be reasonably incidental to his employment. I cannot affirm anything of that description, and I think there is no authority to support such a proposition. Boys will naturally incur unnecessary risks, boys will naturally be mischievous, but to say that whatever unnecessary risks a boy incurs, for his own purpose or to oblige another boy, makes the act incidental to his employment, although totally unconnected with it, seems to me to affirm what on the face of it is an untenable proposition.

According to the findings in fact of the learned arbitrator this boy went down into a saw-pit where he had no business whatever to go. The learned arbitrator is unable to say whether at the time the boy went down the pit the circular saw was revolving or not, and we must therefore take it that it may have been revolving at the time the boy descended. Even if it were not revolving, the boy knew perfectly well that it might be set in motion, and to go down the pit in order to get his friend's tea can which had fallen into the pit seems to me to be absolutely without connection with his employment. He incurred, in my opinion, a risk unconnected with his employment for a purpose of his own in which the employer had no interest. Regrettable as the accident was, I think it is impossible to say that it comes within the scope of the Workmen's Compensation Act.

LORD ORMIDALE—I entirely agree with the opinions which your Lordships have delivered. The only difficulty I felt at the start of the case was in deciding the case in the event of our having to treat findings 8 and 9 as truly findings in fact. For the reasons stated by your Lordships I entirely agree that they are not findings in fact. No. 8 is a finding of mixed fact and law, and No. 9 is a finding entirely of law. These so called findings in fact being out of the way, it appears to me that the 7th finding in fact is conclusive in this case, because by that finding in fact it is ascertained that in the ordinary performance of the duties of the respondent's employment he was never required to enter the saw-pit, or, as the arbitrator phrases it in his note, it was outwith his ordinary duties to enter the saw-pit.

What he did might have been excused had he entered the saw-pit for some purpose connected with his employment. But he did not. He entered it to recover this tin tea can—an act which had no connection whatever with his employment. Therefore I do not think that what he did was reasonably incidental to his employment, especially when one takes into consideration the additional fact that in entering the saw-pit as he did the respondent had to face a peril which he would not in the ordinary course of his employment have had to encounter, and that he knew that it was a dangerous place to enter. Accordingly I agree with your Lordships that the question must be answered in the negative.

The Court answered the question of law in the negative.

Counsel for the Appellants—MacRobert, K.C.—J. A. Christie. Agents—Manson & Turner Macfarlane, W.S.

Counsel for the Respondent—Wilton, K.C. —Macdonald. Agents—Robert White & Company, S.S.C.

HOUSE OF LORDS.

Friday, June 18.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

STEWART *v*, MACLAREN AND ANOTHER.

(In the Court of Session, November 12, 1919, 57 S.L.R. 66.)

Succession — Testamentary Writings — Revocation — Third Codicil Repeating Provisions of Second save One, and Expressly Confirming Will and First Codicil.

A testatrix left a will and three codicils. The third codicil, which was notarially executed, repeated the provisions of the second codicil with the exception of one,

and expressly confirmed the testament and first, but not the second, codicil. The provision omitted to be repeated was the appointment as trustee of a law agent, the son of the notary. Trusteeship carried a legacy of £500. The subscription to the second codicil was very illegible.

Held (*aff.* judgment of the First Division) that the second codicil was not revoked.

This case is reported *ante ut supra.*

The pursuer Miss Jessie Stewart appealed to the House of Lords.

At the conclusion of the arguments on behalf of the appellant, counsel for the respondents being present but not being called upon—

VISCOUNT HALDANE—The litigation out of which this appeal has arisen relates to the trust-disposition and settlement of Mrs Thompson of Pitmedden, in Aberdeenshire, who died on the 17th of July 1915. Shortly before her death she had made a will and three codicils. Mrs Thompson was a lady in rather infirm health who had survived her husband, and being childless had adopted a son, who was about ten years old at the date of the testamentary documents to which I am about to refer. The lady was intimate apparently with Miss Jessie Stewart, a near relative, who is the appellant in this case, and whom she appointed one of her trustees. The respondents are Mr Duncan MacLaren, of Edinburgh, and his son, who as a firm carry on business there as Solicitors before the Supreme Court, and I think as Writers to the Signet. Mrs Thompson by her testamentary dispositions purported to appoint Miss Stewart and Miss Stewart's brother, Sir David Stewart, who is now dead, which explains his absence, and the two MacLarens, who are the respondents to this appeal, as trustees. The action is brought, not for the purpose of wholly setting aside Mrs Thomson's dispositions, on the ground that she was not competent mentally to make them, but for their reduction *pro tanto* in so far as they appoint the two MacLarens trustees, giving each of them a legacy of £500, and allowing the taking of profit costs by the MacLarens, who were the law agents in the administration of the trusts.

The third point raised in the case was that the last codicil was tantamount to a revocation of the intermediate codicil; that under the intermediate codicil Mr MacLaren junior had been appointed trustee, and that codicil being gone Mr Maclaren junior was no longer trustee, and the implied right to his £500 therefore disappeared.

The will was executed when Mrs Thompson was ill, and Mr MacLaren went up to Aberdeen from Edinburgh for the purpose. The first codicil was also executed the next day, the 13th of June 1915, when he was there. The second codicil was a codicil which had to be executed as the result of discussion and communications which had taken place, and he again went to Aberdeen for that purpose. The second codicil was executed by the lady in a very shaky handwriting. Mr MacLaren, who appears to have been careful and a little nervous, observed that someone who was present took the testatrix's hand and guided it, as he thought unduly, by adding a second edition of her signature. When he got back to Edinburgh he appears to have taken a pen and struck this out as a thing which had not been the script of the testatrix herself. He took the advice of counsel, who advised that probably the codicil was all right—she had known what she was doing, and the first signature, although very ill written, would be sufficient to carry the codicil. But counsel suggested that it would be wise to have a confirmatory codicil, and accordingly Mr MacLaren went again to Aberdeenshire and prepared the third codicil, in which he inserted words of confirmation. He explains that as the testatrix was in a very shaky condition, and he thought the codicil should be executed before himself acting notarially, he took the view that the codicil should not contain any direct bequest to his son or himself, and consequently he drew the codicil as in its terms simply confirming the trust-disposition, and first codicil too, dated the 13th June.

Now the question is, under what circumstances is the Court to approach the question of construction? The question of construction arises simply upon these words—"I hereby confirm the said trust-disposition and settlement and relative codicil thereto dated respectively 12th and 13th June 1915." Your Lordships observe that there is no reference to the codicil of the 28th June. Mr MacLaren has given an explanation of why, as he was signing notarially the testatrix's third codicil he did not think it proper to make any reference to the codicil which benefited his son. It may or may not have been a good reason—probably it was a foolish reason—but at anyrate it is found by the Court that Mr MacLaren was an honest gentleman, and they cast no doubt upon the freedom of his motives from anything sinister.

Under those circumstances it is suggested, on the one hand, that nobody who drew a document of this kind, which confirmed only the will and the first codicil, could possibly have meant to confirm the document that is omitted, namely, the second codicil. It is suggested, on the other hand, that the explanation I have referred to is a satisfactory explanation of motive. Upon these respective contentions the observation I have to make to your Lordships is that they appear to me to be wholly irrelevant to the real point. The only thing that can be looked at is the language, and we have to look at the language scientifically and apply to it the rules usually applied in these matters. One of these rules is that the words of revocation must be clear; it is only the words you can look at, and that you cannot speculate one way or the other, because the law does not permit of it. Now looking at the words, what happens here is that the lady says she confirms the original will and the first codicil. It may

well be that these did not want confirmation, and that the words therefore are wholly inept. Can one draw from the fact that she has used language which purports to make such a confirmation, a confirmation which may be altogether unnecessary, the inference that she intended to revoke another instrument which she does not embrace in these words of confirmation. I think not. I think the words must be read as meaning just what they say and no more than they say. She elects to put words of confirmation as applicable to two instruments, and the third, for some reason or another upon which we are not at liberty to speculate, she leaves to take its chance.

Now the evidence has satisfied the Courts below that there is no reason for setting aside that second codicil, the codicil of the 28th June, and therefore it stands, so far as any allegation of improper conduct is concerned. For these reasons, I am of opinion that it also stands so far as the last codicil is concerned, and that it was not revoked by that codicil. Under these circumstances it seems to me that this appeal fails, that the interlocutors of the Court below must be affirmed and this appeal be dismissed, and I move your Lordships accordingly.

VISCOUNT FINLAY—I am of the same opinion.

We have had the advantage of a very able and interesting argument from Mr Normand. The question is, Did the notarial codicil of the 10th July revoke the codicil of the 28th June, in which codicil alone Mr Alasdair MacLaren is appointed a trustee? There is a signature to the codicil of the 28th June made under somewhat peculiar circumstances which have been described, the lady's hand being assisted, and that signature was afterwards erased by Mr Duncan MacLaren. But there was also a signature which had been made by the lady unassisted, but which is extremely illegible. Under these circumstances doubt was felt as to whether that codicil could be considered to have been properly executed, and accordingly a notarial codicil of the 10th July was prepared and notarially executed before Mr Duncan MacLaren himself as notary. He states that the portion of the codicil of the 28th June about the appointment of his son was not reproduced in that of the 10th July on account of his thinking that it would invalidate the instrument if such a provision in favour of his son were contained in an instrument which he notarially executed.

Now under these circumstances it has been contended that, inasmuch as the notarial codicil of the 10th of July repeats textually the provisions of the codicil of the 28th of June, with the exception of that which relates to the appointment of Mr Alasdair MacLaren as trustee, it must be taken that the appointment of Mr Alasdair MacLaren as a co-trustee is revoked. I do not draw that inference. It appears to me that what was desired was to make certain as to the validity of the legacies contained in the codicil of the 28th of June, and for that purpose you have the notarial execution of the codicil repeating the legacies contained in that of the 28th of June. There was nothing in the 10th of July codicil about Mr Alasdair MacLaren as trustee—it is alleged for the reason given by Mr Duncan MacLaren. I cannot draw the inference that the instrument of the 10th July under these circumstances revoked the appointment of the trustee. It seems to me that what was intended was to remove all doubt, owing to the question as to execution, with regard to the instrument of the 28th June so far as it affected the matters which are repeated in the codicil of the 10th July. The appointment of Mr Alasdair MacLaren as trustee was left to take its chance on the question of the validity of the execution of the codicil of the 28th of June. I cannot see how under these circumstances one would be justified in inferring that there was a revocation of that appointment.

I concur in what has been said by the noble and learned Viscount on the Woolsack to the effect that this appeal ought to be dismissed.

VISCOUNT CAVE—I concur.

LORD DUNEDIN—As regards the second point I have nothing to add to what has already been said by my noble and learned friends who have preceded me.

LORD SHAW—I concur in the judgment which has been pronounced by my noble and learned friend opposite.

I desire, however, to say that I thought the brief but very impressive argument presented by Mr Normand to this House on the second point which I shall mention was one well worthy of consideration. The view that the learned counsel presented was this, that when a testator deliberately repeats a codicil in its entire terminology with the exclusion, however, of one particular part, or of one particular bequest or nomination, from that repetition, then there is an implied revocation by reason of the ignoring of that part.

The law with regard to the construction of testamentary documents is that a revocation by one codicil of any part of the contents of another or of the will must either be express or by a reasonable implication.

In the present case there was upon the 28th of June a curious looking codicil so far as the signatures were concerned, and that codicil did contain a nomination of Mr MacLaren junior as a trustee. It also contained a variety of other provisions, and it contained the further clause (which I consider of importance), that it went out of its way, so to speak, to confirm the will itself and the first codicil which had been made. Doubts having arisen in consequence of the curious signature or signatures attached to that document of the 28th of June, there was on the 10th July a repetition by the testator of all the codicil of the 28th June except the nomination of MacLaren junior to which I have referred. There was an identical repetition of the confirming of the will and of the first codicil. I think that of importance, as showing that the desire of the testatrix on the 10th July was to put

herself in the same position as she had occupied on the previous 28th June. She repeated what she had done on the former date; but it so happened that the notarial apparatus would have completely failed—at least it was so feared—if the notary's son's appointment had been inserted in the codicil signed by the notary himself. Accordingly, still desiring confirmation, there was no question of revocation in her mind. She employed the confirming instrument that was at hand and employed it without destroying it by introducing any doubtful matter. In my view, accordingly, it is not a reasonable implication that she meant revocation, but the reasonable implication upon the contrary is that she meant confirmation. That is my view. She did not interfere with the nomination of Mr MacLaren junior, because, in the circumstances of the father being the notarial signatory, she could not. She left that matter where it stood, and as it turns out that the codicil of 28th June is good in law the nomination within it stands. I do not find that it is a necessary implication from the ignoring of a certain provision of the codicil of the 28th of June in that of the 10th July that the part so left out from the category of repetition was meant to disappear from the testamentary intentions of Mrs Thompson.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuer (Appellant)—Condie Sandeman, K.C.—Normand. Agents—Alex. Morison & Company, W.S., Edinburgh—Beveridge & Company, Westminster.

Counsel for the Defenders (Respondents)—Lord Advocate (T. B. Morison, K.C.)—Walter Watson. Agents—Macpherson & Mackay, W.S., Edinburgh—John Kennedy, W.S., Westminster.

Friday, June 18.

(Before Viscount Haldane, Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw.)

EISEN *v.* M'CABE LIMITED.

(In the Court of Session, November 29, 1919, 57 S.L.R. 126.)

Contract—Pactum Illicitum—War—Emergency Legislation—Timber—Timber Control Order 1918.

The Timber Control Order 1918, Part I, section 2, provides—". . . No person shall . . . (*b*) sell or enter into any contract for the sale of any such timber" [*i.e.*, imported] "except to the holder of a permit granted by or on behalf of the Controller. . . ." *Held* (*aff.* judgment of the First Division) that an agreement to sell on the condition that the buyers should obtain a permit was void.

This case is reported *ante ut supra.*

The pursuer Lewis Eisen appealed to the House of Lords.

At the conclusion of the arguments on behalf of the appellant, counsel for the respondents being present but not being called upon, their Lordships delivered judgment as follows:—

VISCOUNT HALDANE—This appeal arises out of an action brought by sellers of timber under a contract, for damages for non-fulfilment of the contract by the buyer. The answer made is that the contract was illegal because the buyer was not a person provided with a permit, and under the law existing at the time there could be no contract excepting with a person provided with a permit from the Timber Controller.

The action came before the Lord Ordinary, who directed that there should be a proof before answer, taking the view that there was a conditional contract, and that it should be permitted to the pursuer to prove that if the buyer had chosen to take the proper steps to obtain a permit he might have got one, and consequently that the contract might have been implemented. The First Division, however, on appeal recalled that interlocutor and dismissed the action on the ground that there was no contract at all.

Now the contract itself was of this nature—Messrs Cant & Kemp, timber merchants, acting on behalf of the appellant, agreed to sell a quantity of timber lying in store at Glasgow, consisting of so many planks *ex* such-and-such ships at such-and-such prices, subject to the following conditions:—First, that the buyers obtained a permit from the Timber Controller to purchase; secondly, four weeks' free rent to be allowed to the buyers from the date of the permit; if incurred, then fire insurance to be for sellers' account; and payment to be made by cash in Glasgow in one month from date of permit less 2½ per cent. discount.

Now I pause to observe that that contract on the face of it appears to be an actual contract subject to a resolutive condition, or condition-subsequent, which would put an end to it if not fulfilled. It is not in the form of a contract which had no existence at all until some condition which was preliminary to its existence as a contract should come into operation. Is such a conditional contract, resoluble by a condition-subsequent, one which at its date, the 22nd October 1918, the law allowed? Now the Timber Control Order 1918, which was then in operation, provided by Part I, paragraph 2 (*b*), that no one should "sell or enter into any contract for the sale of any such timber except to the holder of a permit granted by or on behalf of the Controller, and then only in accordance with the terms and conditions specified in such permit." These words appear to me clearly to prohibit actual sale and the entering into any contract of sale equally, and they appear to me therefore to render the contract which purported to be entered into in the case before this House altogether inoperative in law. I agree entirely with the view taken by the First Division, and I move your Lordships accordingly that this appeal be dismissed, and dismissed with costs.