Turner appealed to the Court of Session.

Authorities cited — *Wright* v. *Lady Elphinstone*, July 20, 1881, 8 R. 1025; *Hill* v. *Wood*, January 30, 1863, 1 Macph, 360; *Russell, &c.* v. *Marquis of Bute*, December 8, 1882, 10 R. 302; *Thomson* v. *Dundee Police Commissioners*, December 8, 1887, 15 R. 164; *Brown* v. *Gibson & Wilson*, June 29, 1859, 31 Jur. 607.

At advising—

LORD YOUNG—The property of the *solum* of the churchyard is vested in the heritors, but as trustees with a duty to use and see that it is used only as a churchyard, and in the performance of that duty they may be controlled by this Court at the instance of anyone having a legitimate interest. Should a question arise as to the limits of this *solum*, as, for instance, whether it includes the site of a surrounding wall, or of the wall bounding it on any side or at any part, or whether it is altogether within the wall, the proper parties to try the question are, on the one hand, the heritors as the proprietors of the *solum* of the churchyard, and on the other the proprietors of the *solum* immediately adjoining at the place in dispute.

Here such a question occurred regarding the site of the wall on the north side of the churchyard of Dunfermline, where the respondent was and is proprietor of the *solum* immediately adjoining that of the churchyard—the respondent maintaining that the wall at that part was on his *solum*, and the heritors that it was on theirs—*i.e.*, part of the churchyard. The question occurred in the Dean of Guild Court, and the Dean of Guild properly, I think, thought that this being a question of heritable right was not within his competency, and therefore sisted process that the respondent might take steps to have it settled by a competent Court.

In these circumstances it was, I think, very proper that the heritors should consider whether it was fitting and required of them, in the discharge of their public duty as the trustees and guardians of all legitimate interests in the churchyard, that they should engage in such a litigation with the respondent, or whether it would be more prudent to come to terms with him regarding his contemplated operations. They did so consider the matter, I assume with a becoming desire to do their duty as the guardians of all legitimate interests in the churchyard, which they certainly are, and with the result that they saw fit to arrange the matter with the respondent in the manner expressed in the joint-minute of 4th September 1893.

No one interested in the churchyard, no one in the parish, questions or complains of this proceeding on the part of the heritors except the appellant, a fact which is *prima facie* adverse to the notice that the heritors have thereby violated or neglected their trust duty as guardians of the public interest in the matter, so as to call for or warrant the interference of this Court under the controlling power which I have referred to. Another fact of similar tendency was mentioned to us, viz., that other and immediately adjoining parts of the same north wall have been used in the same way by the conterminous proprietors.

But the appellant contends that under the burying-ground right specified in the document No. 33 of process, he is entitled to stop the operations as assented to by the heritors until the question of heritable right which I have referred to, and which the Dean of Guild has held himself incompetent to try, is tried in the competent Court in an action with him, or (which seems the only other alternative view on which we could hinder the Dean of Guild from acting on the arrangement with the heritors) that we should hold that it is the public duty of the heritors to litigate this question of heritable right, and that they violated this duty by becoming parties to the joint-minute.

I am unable to assent to either of these views. I think it was within the power of the heritors to make the arrangement expressed in the joint-minute, and that they did not thereby violate or neglect, but legitimately, and, so far as I can judge, reasonably and judicially performed their duty as the proprietors of this churchyard in trust and as guardians of the public interest therein.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered to the Dean of Guild's interlocutor.

Counsel for Appellant—Trotter. Agent—Daniel Turner, S.L.

Counsel for Respondents—Jameson—C. N. Johnstone. Agents — Carmichael & Miller, W.S.

Friday, December 15.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

BALLANTINE *v.* THE EMPLOYERS INSURANCE COMPANY OF GREAT BRITAIN, LIMITED.

Insurance — Policy — Post-mortem Examination—Condition-Precedent.

A policy of insurance provided that if the insured sustained personal injury caused by accidental, external, and visible means, and the direct effect of such injury should occasion his death, the insurers would pay to the legal personal representatives a certain sum, subject to provisions which were agreed to be conditions-precedent to the right to recover, including the following—"(5) In case of death the legal representatives of the deceased must deliver to the company a certificate from the

medical attendant of the assured stating . . . the nature of the injuries and the cause of death, and shall produce all documents necessary to prove their title, . . . and shall furnish all such other information and evidence as the directors may require from time to time or may consider necessary or proper to elucidate the case."

The insured lost his life while fishing in a river, and on intimation of a claim by his mother, who was his legal personal representative, the medical adviser of the insurers, on certain information, applied for a *post-mortem* examination to the family physician, who on his own authority refused the request. The insurers made a second demand on a firm of law-agents, who were not at that time acting for the mother, and who had no power to grant the request. The insurers refused to pay on the policy, on the ground that in view of the 5th condition of the policy the refusal of a *post-mortem* examination was a breach of a condition precedent to recovery.

In an action by the mother of the insured—*held* it was proved that the deceased died by accidental drowning, and even assuming the defenders' construction of the 5th condition to be correct, they could not found upon it, because demand for a *post-mortem* examination had not been made upon the deceased's legal representatives.

Opinion (*per* Lord Young) that the company could not plead the refusal of a *post-mortem* examination as the breach of a condition-precedent if it appeared from the whole evidence that the insured died from accident.

James Ballantine, chairman of Ayrshire Foundry Company, was insured with the Employers Insurance Company of Great Britain, Limited, Glasgow, for £1000 under a policy in these terms—"(1) The company, if during the currency of this policy the assured shall sustain any personal injury caused by accidental, external, and visible means within the conditions of this policy, and the direct effect of such injury shall occasion the death of the assured within three calendar months from the happening of such injury, shall pay to the legal personal representatives of the assured, within three calendar months after it shall have been proved to the satisfaction of the directors of the company that the death of the assured was occasioned as aforesaid, the sum of one thousand pounds: . . . Provided always, that this policy is subject to the conditions endorsed hereon, which are to be taken as part hereof, and are hereby agreed to be conditions-precedent to the right of the insured to sue or recover hereunder." The conditions included, *inter alia*—"3. The assured shall not be entitled to make any claim under this policy for any injury from an accident unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished, and that this assurance shall not extend to . . . any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease, . . . or to any death arising from disease, although such death may have been accelerated by accident. . . . 5. In case of death the legal representatives of the assured must deliver to the company a certificate from the medical attendant of the assured stating as fully as possible the nature, extent, and duration of the injuries and the cause of death, and shall produce all documents necessary to prove their title as such legal representatives, and shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case."

On 30th September 1892 while Mr Ballantine was fishing in the river Orchy he fell into the stream and was found dead two days afterwards.

Upon 1st October the Insurance Company were informed of the death by their district inspector and by Messrs Emslie & Guthrie, solicitors, Ardrossan, who had been agents of the company in getting the insurance effected.

Upon 3rd October 1892 Dr Duncan, on behalf of the Insurance Company, telegraphed to Dr Allan, the medical adviser of the deceased's family—"As medical adviser of Accident Company where Ballantine insured, am asked to certify death as from accident; for this *post-mortem* examination necessary; will you see friends? arrange for to-morrow, and wire time fixed." The same evening Dr Allan replied by this telegram—"Have seen friends, and your proposal is refused." On the same day Dr Duncan wrote this letter to Dr Allan—"In confirmation of the telegram which I sent you to-day, I now write to ask you if you will be good enough to see the friends of the late Mr Ballantine, and ascertain whether they will allow a *post-mortem* examination to be made in order that we may ascertain with certainty the cause of his death. As medical adviser of the company I consider this necessary, and I will feel obliged if you will point out to the friends that under condition 5 of the policy of assurance the company is entitled to ask for any evidence of the cause of death which the directors may consider necessary. Please wire me when you can meet me in connection with this case at Ardrossan and the decision of the friends." Dr Allan replied the next day—"I am in receipt of your letter of yesterday. The telegram which I sent you yesterday evening conveyed to you the decision of the friends on the matter of having a *post-mortem* examination of the body of the late Mr Ballantine. After the anguish which his mother has endured for the last four days, it was felt that it would be a cruelty to have her feelings further harrowed by the examination you propose. For my own part I think the examination is quite unnecessary, and when you know the particulars of the

accident, and the evidences of Mr Ballantine's state of health at the time, I think you will agree with me."

The Insurance Company upon 4th October wrote to Messrs Emslie & Guthrie in these terms—"Referring to telegram sent yesterday by Dr Duncan to Dr Allan, I have now to intimate to you that from the information we have, we are of opinion that death did not occur by accident within the scope of our policy. The only means of ascertaining whether it did or did not is by *post-mortem* examination, and we have therefore to repeat our request, before it be too late, that you will consent to a *post-mortem* examination, and that our medical adviser be present, otherwise we shall be obliged to found upon your refusal. Meantime we must repudiate all liability under our policy." This letter was handed to Messrs Emslie & Guthrie by the defenders' superintendent Ferguson, and on 5th October they replied—"When we intimated on 1st inst. the accident to your office, we did so in the ordinary way, as agents for your company. We had no instructions from Mr Ballantine's representatives to do so, and the terms and tone of your letter were surprising. We received your telegram to-day, and we have simply to refer to our interview with Mr Ferguson yesterday, and to say that we have no power to consent to a *post-mortem* examination."

Upon 7th October Messrs Emslie & Guthrie applied for the sum in the policy in these terms—"We are now instructed by Mrs Ballantine, mother of the deceased, and who is executor under his will, to intimate in terms of the policy her claim for the sum insured thereby, and you will be good enough to accept of this letter as due notice."

Mr Ballantine had been buried upon 5th October.

Upon 10th October the Insurance Company wrote this letter—"Referring to your letter of 7th inst., and to our interview on Saturday, I need not repeat our reasons for refusing to admit this claim. We should not be at all unwilling to have the principles involved established by a court of law, and we are strengthened in this by the advice of our solicitors, an extract from whose letter is annexed hereto. Our desire, however, is to act liberally towards our policy-holders, and we should contest this case with regret, as it would doubtless be a very painful matter to the friends of the deceased, involving as it would our demand for an exhumation of the body. To obviate the painful necessity referred to, and with the desire to go to the furthest limits of liberality, we are willing, subject to your acceptance before our meeting on Thursday first, to recommend the directors to dispose of the whole matter at once by a payment of £750. You will please understand that this suggested settlement is proposed entirely without prejudice."

This offer was not accepted, and Mrs Ballantine, as general disponee and sole executrix of her deceased son, raised an action against the company for the sum in the policy.

The defenders averred—"Explained that the circumstances under which the pursuer's son met his death were so peculiar that the defenders had reason to believe that he died from natural disease, or some other cause against which they do not insure, and not by drowning, as alleged by the pursuer. Their consulting physician, Dr Duncan, having had the details, so far as known, laid before him, stated that he could not certify the cause of death as from accident without a *post-mortem* examination of the deceased's body, and accordingly he wired on 3rd October to that effect to Dr Allan, the pursuer's family doctor, and asked him to see the friends and arrange for a *post-mortem* examination being held the following day. Dr Allan telegraphed back that the deceased's relatives, before whom he had laid Dr Duncan's request, declined to allow of the examination. The defenders at once intimated by letter, dated 4th October 1892, to the pursuer's agents, that they were of opinion that death did not occur by accident within the scope of the policy, and that the only way of ascertaining whether it did or not was by *post-mortem* examination. They accordingly repeated their request that the pursuer would consent to a *post-mortem* examination, and that their medical adviser should be present, otherwise they would found upon the refusal. This request and other requests of the same nature were refused. The pursuer has thus failed to comply with the conditions of the policy quoted in answer 3, and which were declared to be conditions-precedent to a claim under it. The pursuer has never offered any evidence to the defenders with a view to satisfying them that the cause of Mr Ballantine's death was an accident within the meaning of the policy founded on. On the pursuer furnishing evidence to this effect, satisfactory to the directors, the defenders are willing to pay or consign the sum in the policy."

The defenders pleaded—"(1) The pursuer having failed to comply with the conditions of the policy, which were thereby declared conditions-precedent to her right to sue or recover under the same, the defenders should be assoilzied. (2) *Separatim*, the pursuer's son not having met his death from accident within the meaning of the policy founded on, the defenders should be assoilzied with expenses."

The Lord Ordinary allowed a proof.

Peter Macgregor, Mr Ballantine's ghillie, deponed—"Mr Ballantine was a tall man, being nearly 6 feet in height. When he was fishing the Elbow and Tree Pool the second time I noticed that the water was again up to about the middle of his thigh, and the seat of the waders was not wet. He was just in about the same depth of water on both occasions, and that might be 2½ or 3 feet. About the time that Mr Ballantine went into the water again after lunch, I noticed that Mr Radcliffe and his ghillie were at the upper end of the pool on the opposite side. I was standing on the shingle behind Mr Ballantine, and about 20 yards from him, keeping clear of his

cast. He was casting at an angle across the stream. He was farther up the river than I was, and I saw the left side of his face. About ten minutes after he resumed fishing after his lunch I noticed that he was examining his cast. He had been fishing during the morning with salmon fly, and having got no success he fished with worm bait after lunch. When he was examining his cast I noticed that he was still in the same depth of water as he had been previously when he was fishing. After I saw him examining his cast I turned and went to the basket to prepare another cast. While I was preparing an extra cast I heard a scream, and turned round and saw Mr Ballantine falling in the river, slanting backward. He made a movement with his legs, and that movement of his legs pushed him into the rapids. The moment his legs made the movement the current caught him and carried him into the rapids. His head got up in the rapids once, and then he disappeared. At the point where Mr Ballantine was fishing the water was going pretty fast, and he was near the place which I have described as the rapids. When he disappeared I had nothing but a short gaff, and I could do nothing with it to help the man in the water. After Mr Ballantine's head disappeared it reappeared in the eddy, and he gave a low scream, but not so loud as the first one. I heard it quite well, however. Mr Ballantine called out again, but it was a very low scream or gurgle—more of a gurgle. By that time he was out of the current and in the eddy at the foot of the Tree Pool. When Mr Ballantine gave the scream or gurgle there was nothing but his head above the water. I noticed the point of the rod in the stream. (Q) Did Mr Ballantine appear to have kept hold of his rod till that point when he gave the gurgle?—(A) No, the first time his head appeared the rod seemed to be under him, and I saw the point of it as if he were holding it. The rod was found in the Tree Pool, just about the point where he gave the gurgle. When Mr Ballantine fell I sprang to catch him, but he disappeared before I got to the water's edge. I called out in Gaelic to the shepherd's wife to fetch a rope. I kept opposite to Mr Ballantine while he was being carried down the river. In the stream he was carried down very fast. The shepherd's house is about 200 yards from the river side. While Mr Ballantine was in the eddy I thought that he was swimming towards me, towards an old tree on the south side. That old tree was partly under water that day, the river being so high. Mr Ballantine did not succeed in reaching the old tree as the eddy carried him round towards the north side. When carried a certain distance towards the north side he disappeared, but he appeared a third time just before he was carried out of the pool. His head appeared longer above the surface in the eddy than on the other occasion. When I thought that Mr Ballantine was swimming towards the tree I think his eyes were open, but I don't think there was any recognition in his face at that time. He looked flushed and red in the face. (Q) Did he go out of sight again when he was caught at the end of the eddy?—(A) He went out of sight before that. About 30 yards below the eddy he appeared again for a minute, and his head turned round and then he disappeared. (Q) Did he lift his head?—(A) There was nothing but his head out of the water, but he turned round and I saw the collar of his coat. He then rolled over backwards, and that was the last I saw of him. He was just at the top of the rapids then, and I knew that his case was hopeless. He was carried down the rapids, which are below the pool. The river gets into full current below the eddy, and it was when he got into the full current below the eddy that I saw him with his head up, roll backwards, and thought his case was hopeless. . . . From the time Mr Ballantine fell into the water till I lost sight of him would just be about three minutes altogether, as far as I could judge. I think the distance he would go in that time would be about 60 yards, but it might be a yard or two more or less."

The medical evidence for the pursuer was to this effect:—

Dr Allan deponed—"Mr Ballantine was a robust vigorous man, and very much above the average as regards health and strength. By constitution he was a strong man, and all his organs were perfectly healthy. He was never troubled with any heart or liver complaint or anything of that kind. He was six feet high and about fourteen stones in weight. . . . When he was lifted out of the river the froth came from his mouth and nostrils. I had no doubt that the cause of death was drowning. (Q) Was that manifest to any one of ordinary skill who saw him?—(A) It was the natural inference. (Q) I believe you looked at the body more minutely at the hotel?—(A) I may say only the face; I did not see him undressed. (Q) You know the peculiar appearance which drowned people have, what is called goose-skin?—(A) I did not see that, but I inquired afterwards and I found that he had it. Assuming that that was present, that confirms my opinion that death occurred by drowning. I think that the froth coming from the nostrils and mouth is a certain sign of death by drowning. That is caused by attempted breathing—water being drawn into the lungs and mixed with the air already in the lungs. . . . I was very much surprised when I got the telegram [requesting a *post-mortem* examination], because I considered it utterly unnecessary. I considered it an unnecessary piece of cruelty to inform Mrs Ballantine anything about it. She had very strong feelings on the matter. She expressed herself before the body was found as dreading that there would be any mutilation. I knew her feelings as regards that, and I told her nothing about the proposal. She was suffering dreadful anguish at the time. (Q) I see they were good enough to ask you to arrange this matter?—(A) They were, with friends, but not with Mrs Ballantine. I consulted the only friends

that were available, namely, Mr Cleminson and Mr Scott. Mr Cleminson was a partner of Mr Ballantine, and stayed in Ashgrove House along with the family. Mr Scott was formerly Mr Ballantine's tutor, and is now engaged in the company of which Mr Ballantine was chairman. I told Mr Cleminson and Mr Scott my opinion of the defenders' demand. I sent in reply to Dr Duncan the telegram, 'Have seen friends, and your proposal is refused.' The friends there mentioned were Mr Cleminson and Mr Scott."

Dr Joseph Bell deponed—"(Q) I wish you to assume from me that the ordinary medical attendant of Mr Ballantine pronounced him to have been in excellent health, with his organs in a normal and healthy condition, that about three weeks prior to the accident he was examined by Professor Fraser and passed for life insurance by the Standard Company, that he fell into the water and was found two days afterwards, the external symptoms being goose-skin and frothing from the mouth and nostrils—in these circumstances, what is your opinion with regard to the cause of death?—(A) That it could hardly be explained by anything else except death from drowning. I understand he was seen to fall into the water. The froth coming from the nostrils and mouth is a common symptom in cases of death from drowning, and it means that the water and air have met together in the breathing apparatus, and have been churned up in the efforts at respiration. . . . When I was reading the case, and saw the statement about the first scream, I stopped and said to myself, 'Possibly epilepsy,' but when I read on and saw about the second scream and the gurgle I said to myself, 'No, drowning.' In the case of epilepsy there would be the one cry on the occasion of the attack, and it is exceedingly rare to hear a second or a third. Apoplexy never entered my mind after the young man being passed by a distinguished physician like Professor Fraser, whose accuracy is so great, and it would be impossible that a man who was to suffer from apoplexy should not have shown some symptoms in his blood-vessels of a tendency thereto. I also think that a second and third scream would be very unlikely in the case of apoplexy. Angina pectoris is exceedingly rare at Mr Ballantine's age. Aneurism is also rare at his age, and it is excluded by Professor Fraser's examination. . . . *Cross.*—(Q) Might the froth not have been caused by some water getting into his throat after death, and being churned up, or through decomposition in the lungs?—(A) No, we could not trust to that: the churning up of the water from the movement of the body might possibly do it. (Q) But if water got into his mouth, it would be churned up and mixed with the air from the lungs, while the body was being carried to the hotel?—(A) Yes, but the explanation of the froth is that the man was drowned. (Q) But it would have made it perfectly certain whether or not the man was drowned if he had been examined *post-mortem* and the lungs had been found to be filled with air and water?—(A) It would have been far better had he been examined *post-mortem*."

Professor J. R. Fraser deponed—"I am Professor of Materia Medica and Therapeutics in the University of Edinburgh. I am chief advising medical officer to the Standard Life Insurance Company. I examined the deceased Mr Ballantine in reference to a proposal for insurance upon his life with the Standard Company on 6th September 1892. I made a minute examination of Mr Ballantine, and the general conclusions were that the present state of his health was good, that the state of the different organs was healthy, that his constitution was strong. . . . (Q) Was there anything in your examination to suggest to your mind that any change might be expected in his bodily condition between the 6th and 30th September?—(A) No, barring some acute illness, and assuming that the normal conditions of life remained the same, there was absolutely nothing. He was a man whom I should have expected to live a long time. Personally he was a good life, and I so advised the Insurance Company. . . . (Q) Assume from me that he was fishing in the Orchy when he slipped off his feet, that he gave a scream upon the accident occurring, and that he gave other two screams subsequent thereto, the latter being more of a gurgle than a scream, that he was found two days afterwards, and that the persons finding him, including a medical man, found froth emerging from his mouth and nostrils—what did that man die of?—(A) I have no doubt that he died of drowning. No other suggestion occurs to me with regard to the cause of death which would be reasonable."

For the defenders Dr Duncan deponed—"I have read the notes of evidence given by Peter Macgregor in this case. (Q) Assuming these to be the facts under which Mr Ballantine met his death, what do you say as to the possible cause of death?—(A) I think that there is no evidence whatever in the statement as given by the ghillie to show that the death was certainly caused by drowning. The evidence seems to point to the deceased having been suddenly seized with illness of some kind. A *post-mortem* examination would certainly have placed the cause of death beyond doubt. (Q) Is there any difficulty after a *post-mortem* examination is made in saying whether a man has actually died from drowning or not?—(A) Not under such circumstances. (Q) What possible cause of death do you suggest?—(A) What occurred to me after thinking over the matter was that it was quite a possible thing that he might have died from rupture of a deep-seated aneurism in the chest, or from rupture of an aneurism of one of the arteries in the brain; looking at the whole circumstances of the case, that seemed to me quite a possible theory of his death. Of course there are other possibilities. He might have had an attack of angina pectoris. We know that such things happen with persons in apparent health, and presenting

no appearance of disease. There are further possibilities of death by rupture of the heart, which I have seen occurring suddenly in a person who did not present any appearance of disease beforehand. . . . (Q) Might there be a premonition of the ailment that was about to seize him just immediately before he was attacked?—(A) It does not necessarily mean instant death; of course a person may live for a few seconds or a few minutes after the bursting of an aneurism, or after rupture of the heart, or after cerebral hemorrhage. A man does not necessarily lose consciousness instantly even after rupture of the heart. (Q) Apart from the question of a seizure of that kind do you find it difficult to account for the circumstances connected with this accident as explained by Macgregor upon the footing that this was a strong robust man and a good swimmer?—(A) The difficulty that occurs to me is that there is no evidence of his having made the slightest effort to save himself, although he seems to have been in perfectly good health. . . . I have been told that Professor Fraser examined Mr Ballantine for life insurance about three weeks before his death. I was told that within the last week. Assuming that Mr Ballantine died from a rupture in the way I suggest, the medical examination such as is usual in life insurance would not necessarily disclose the condition of the blood-vessels. . . . . *Cross.* — (Q) Be good enough to assume from me that when the accident occurred the gentleman was swept off his feet, that he cried three times, that he was apparently swimming towards the edge but was swept away by the current, and that when his body was recovered froth and water were emitted from the lungs through the apertures of the nostrils and the mouth?—(A) Under these circumstances the probability of drowning would be greatly increased. (Q) Suppose that such a case had been presented to you, that would have been one of those reasonable cases in which you would have spared the feelings of the relatives by refraining from ordering a *post-mortem* examination?—(A) Probably I would not have ordered a *post-mortem* examination in a case like that."

Upon 16th June 1893 the Lord Ordinary (STORMONTH DARLING) decerned against the defenders conform to the conclusions of the summons.

"*Opinion.*—I gather from the correspondence that the main object of the defenders in resisting this claim was to test what they call the principle of whether they were within their right in demanding a *post-mortem* examination of the body of the late Mr Ballantine, and whether the refusal to allow that examination has the effect of forfeiting the pursuer's claim. If that was their object, all I can say is, that they have selected a very unfortunate case as a test, because where an insurance company intends to make a demand of this kind, and to found on the refusal of it as importing a forfeiture of the right to recover, it is incumbent upon them to be very careful indeed that they make the demand on the right person. I say nothing against the view that the demand was in itself one which ought to have been granted. There is no condition in the policy obliging the representatives to allow a *post-mortem* examination, but they are bound to furnish all such information and evidence as the directors may require, and it is always a question for the Court to say whether the evidence so required was reasonably necessary or not. I can figure cases of death by accident where it would be unreasonable to demand a *post-mortem* examination. Here, however, I think there were circumstances which made it not unreasonable for the Insurance Company to make the demand which they did. A *post-mortem* examination, however painful, although I think its painfulness has been greatly exaggerated, would have undoubtedly furnished the best and most conclusive evidence on the question whether death was the result of accident or of natural disease.

"But, as I have said, the question is whether the demand was made on the right person. Now, what happened was this. A demand was first made upon 3rd October, in the interval between the death and the funeral, and it was made by Dr Duncan of Glasgow, the medical adviser of the company, by telegram addressed to Dr Allan, the medical attendant of the Ballantine family. It was perhaps a natural enough proceeding for the one doctor to communicate with the other, but it is impossible to say that Dr Allan was in any way an agent of the pursuer in this case, or was entitled to grant or refuse the permission asked. Dr Allan thought the request unreasonable, and refused even to lay it before the pursuer. He took it upon him to send a telegram, which was undoubtedly misleading, to the effect that he had seen the friends, and that the friends refused. For any misstatement of that sort, if it did mislead the defenders, Dr Allan may have to answer, but certainly the pursuer cannot be fixed with liability. I do not think it can be said that the defenders were in any way misled or injured by Dr Allan's reply, for the matter did not rest there. A second demand was made, and this time it was made by the defenders themselves on the firm of John Emslie & Guthrie, solicitors in Ardrossan. Now, if John Emslie & Guthrie had at that time occupied the position of law-agents for the pursuer, which they did a few days afterwards, the pursuer might have been bound by their answer, but in point of fact they did not occupy that position. They had, it is true, acted as law-agents for a company in which the late Mr Ballantine was interested, and of which he was chairman, but that was the extent of their connection with the family, and that apparently is what misled the defenders into the belief that they were the agents for the pursuer. Clearly therefore the demand made on them cannot in any sense of the word be held as a demand made on the pursuer.

"It happens in this particular case that the course for the defenders to take, if they meant to found upon their demand, was a very plain one. The pursuer, who was the

mother of the unfortunate gentleman, was not only the person entitled to make the claim on them, but she was the only person in the world who had any right either to grant or refuse the permission to make a *post-mortem* examination. She was the only near relative that the late Mr Ballantine had, and it was impossible therefore for anybody to grant or to refuse the permission without coming to her. It may be that the defenders were actuated by consideration for her feelings in not making their application direct, but unquestionably to her the application must in the long run have come, and if they did not choose to make the application direct, then I think it is quite clear they took upon themselves the responsibility of selecting the intermediary, and if they selected the wrong intermediary they must suffer the consequences. The only other person who can be suggested as having been in any way entitled to bind the pursuer was Mr Cleminson, a witness in the case, who, though no relation, seems to have been on the most intimate and confidential terms with the family, and indeed to have lived in the house. He was consulted by Dr Allan, and agreed in Dr Allan's view. I do not doubt that authority might very likely have been given to Mr Cleminson to act in this matter on behalf of the pursuer if the necessity for granting that authority had arisen, but it is impossible to say that such authority was ever in point of fact given, and I cannot certainly imply it merely from the friendly relations which are proved to have existed between that gentleman and the pursuer of this action.

"That being so, I approach the consideration of the second question in the case upon the footing that no *post-mortem* examination was in point of fact held, and that the pursuer is not responsible for that, because the demand for it was never made on her. That this most lamentable event bore all the outward semblance of a case of death by drowning cannot for a moment be disputed. The late Mr Ballantine was a man in the prime of life, of the most energetic and buoyant spirit, of temperate habits, and apparently of a very powerful muscular frame. He was certainly the last person in the world of whom one would have expected either an accidental death without a great struggle or a sudden death from natural causes. There is therefore undoubtedly a certain air of mystery about the occurrence, because it it is difficult to account for so powerful a man having been overwhelmed by the stream of the Orchy, and for his having apparently not made so vigorous an effort to save himself as one would have expected. On the other hand, it is a most improbable thing that a man of his temperament and constitution should have been suddenly seized with a fatal affection either of the heart or head while fishing in this Highland stream, and that is really the only suggestion which is made by the defenders. Even although it were proved that Mr Ballantine had fainted in the stream, or had taken an epileptic fit in the stream, that would not absolve the defenders from liability if it was not a seizure of a necessarily fatal kind. Their only case is that he was suddenly seized with what would have proved fatal even if he had been on dry land, and that the circumstance of his being in the water was a mere accident which did not in any way affect the result. Now, I have to choose between these two theories. On the one hand, I have evidence which is admitted, even by the very eminent physicians who were examined for the defenders, as pointing straight to the inference of death by drowning. They all say that this is the natural conclusion from the facts of the case, but they say, on the other hand, that there are certain medical possibilities which did in their judgment made a demand for a *post-mortem* examination reasonable, and which a *post-mortem* examination would in all liklihood have effectually disposed of.

"Now, the doubt in the case arises chiefly from the evidence of the ghillie M'Gregor, and I shall only say of him that while I saw no reason to doubt the honesty of his evidence, I was not equally impressed with his intelligence, and I demur very much to setting up a most improbable theory, as the defender's case involves, upon the strength of an impression formed by this Highland ghillie. He did undoubtedly say that his impression at the time was that the deceased gentleman had taken an epileptic fit. That is excluded by all the doctors as untenable, and his evidence of the cry having been of a strange and death-like kind is inconsistent with the evidence of the other ghillie Macdonald, who says the cry was only an ordinary shout. I cannot help thinking that to some extent the theory put forward by M'Gregor—for it was really nothing more—may owe its origin to the fact that through no fault of his own he was unable to render assistance to his companion, and that it is painful for him to think that death was due to an accidental cause which he was powerless to avert. But if his opinion be discounted from the case, there is really nothing left except bare possibility and conjecture. I acknowledge that it is a little difficult to account for the fact that Mr Ballantine, who was a good swimmer, did not apparently make more strenuous efforts to save himself than he did. At the same time, anyone who has used waders in a Highland stream must know how easy it is to slip, and if once one is carried into deep water, what an encumbrance and a danger the waders must be. In this case the danger was increased by Mr Ballantine being unaccustomed to the use of waders, and there may have been some stroke against a stone or a rock which would tend still further to deprive him of the use of his limbs. All that, of course, is speculation, but the fact is that he was using waders, that he was unfamiliar with the use of them, that in the effort to get further into the stream he appeared to lose his balance, and that he was carried into deep water. All the rest is entirely consistent with the idea of accident, and there is nothing to drive one into so improbable a theory as that of a sudden and fatal seizure.

But what really I think excludes the latter notion from practical consideration, and puts the case beyond reasonable doubt, is the fact that only three weeks before this gentleman was examined by one of the most competent and careful physicians in Scotland, and passed as a good life for the Standard Life Insurance Company. It is possible that in spite of Professor Fraser's examination he may have had some of these deadly diseases which are suggested by the medical witnesses for the defenders, but it is in the highest degree unlikely, and I must proceed not on possibilities but on the reasonable inferences to be drawn from the evidence in the case. In short, I regard the evidence in favour of death by drowning as really overwhelming. I have therefore come to the conclusion that the pursuer has made out her case, and is entitled to decree as concluded for."

The defenders reclaimed, and argued—The contract provided that all the information desired by the directors must be given by the representatives of the deceased. Such information included a *post-mortem* examination, and it must be held that the parties when contracting had in view the possibility of such an examination. Such supply of information was a condition-precedent to recovery. It was admitted for the company that the demand must be reasonable; there must be a reasonable doubt at the time of the assured's death that he did not die of an accident but from disease, or some other cause for which the company was not responsible, although it might be found afterwards upon an examination of the whole circumstances that the assured had died by accident. The facts that the circumstances induced a reasonable doubt of the cause of death, and that a *post-mortem* examination was refused would form a good defence. The next question was as to the parties applied to—The policy provided that they should be the legal representatives. The company could not be expected to know who these were, as that might not be known to anyone until the deceased's testamentary dispositions were known. They therefore applied to the family doctor of the deceased, and intimated the death, and he consulted the friends. That was enough. It was admitted that the question was not brought under the notice of Mrs Ballantine, unless it was by the notice to the agents Emslie & Guthrie, but she had adopted the acts of Dr Allan, and so was liable. In this case there was a reasonable doubt that the deceased had died from drowning, or from one of the causes mentioned by the defenders' witnesses.

The respondent argued—The evidence showed that the deceased had died from drowning. He struggled for two or three minutes, which excluded the idea of a death from natural causes suggested. The fifth condition only claimed that information should be given by the deceased's representatives. If the *post-mortem* examination was to be made a condition-precedent, it ought to have been clearly stated in the policy, because if the policy was to be read as the defenders desired, the company could avoid liability by merely making a demand for a *post-mortem* examination, which the relatives might justly think an unreasonable demand. Again, the demand was to be made upon the deceased's legal representatives. That assumed that in almost every case there must be exhumation as well as a *post-mortem* examination, because very often the legal representatives were not known until after burial. In this case, however, the demand was never made to the legal representative, who was the deceased's mother, and the company had never shown that it was brought under her notice, and that she agreed to give her consent.

At advising—

LORD YOUNG—This is an action upon a policy of assurance against accident for recovery of the sum contained in the policy, and is based upon the ground that the person who was insured lost his life by accident.

The action is defended by the Insurance Company upon two grounds which are embodied in two pleas-in-law—[*His Lordship read the defenders' pleas-in-law*]; and we have had the case argued before us upon both grounds.

With regard to the first plea, this is what is stated by the defenders in Ans. 4 as their attitude when they received news of the accident—[*His Lordship read the averment*].

Any importance this averment has is on account of its connection with the fifth condition attached to the policy of insurance, which provides—[*His Lordship read the fifth condition*].

It appears that the only near relative of the deceased was his mother, with whom he resided at the time he met with the accident, and she is now his legal representative, and the pursuer of the action. The averment is that requests were made by the Insurance Company to the deceased's relatives in order that a *post-mortem* examination might be made. Evidence was led as regards these requests in the Outer House, and the Lord Ordinary has decided that the plea-in-law by the defenders founded upon these requests is unsound on the ground that the parties to whom the requests were made, viz., Dr Allan and Mr Emslie, did not represent as agents or otherwise the mother of the deceased as his legal representative at the time of the accident, and that the request of the Insurance Office to have a *post-mortem* examination before burial was not brought under the pursuer's notice so as to affect her.

It appeared to the Lord Ordinary that from some of the correspondence produced the directors of the Insurance Office wished to make this a test case in order to determine the matter of principle whether they are entitled to call for a *post-mortem* examination whenever they think fit to do so or not. In the letter of 14th November they say—[*Here his Lordship read the letter*].

That signifies that the Insurance Com-

pany want to be able to demand a *post-mortem* examination in any case they think fit to do so, and if it is refused to refuse to pay the sum in the policy. That raises the question in this case, whether, having regard to clause 5 of the conditions annexed to the policy, and to the evidence as to their requests for a *post-mortem* examination, the company are free from any liability under the deceased's policy? and it was argued to us that on these facts they were free from liability without any reference as to whether we should think it was proved that the deceased had met his death by accident within the meaning of the policy.

In that view it is sufficient for the disposal of the whole case, if the view of the Lord Ordinary is right, that neither Allan nor Emslie were the proper persons to whom an application for a *post-mortem* examination should have been made. If the defenders wanted to plead the refusal of a *post-mortem* examination as a defence to the case they ought to have been careful as to the persons they applied to. In this case they had no excuse I think, because it appears that they knew that the deceased's mother, with whom he lived, was the only person who could give the needful authority, and they did not approach her. It was said that they did not do so from a desire not to intrude upon her grief, and I have no doubt that is so, but as a matter of fact they did not approach her with their request. I am disposed to agree with the Lord Ordinary when he says that if the Company chose the wrong intermediary to convey their request to Mrs Ballantine they must suffer the consequences. It is plain that they made no request for an examination to Mrs Ballantine herself, nor I think did they do so to any person for whom she was responsible, and whose words or actings in this matter would be binding upon her. I do not think it is proved that she assented to or approved of the request for a *post-mortem* examination, but I think that it is proved that she was not approached upon the question, and that she neither gave nor withheld her approval or assent to the proposal.

It was said, however, that it was very questionable whether the Insurance Office under this condition had the power to demand a *post-mortem* examination, and although I do not think it is necessary for us to decide that question, as the decision of the first question I have just stated is enough to dispose of the case, I have no objection to state my opinion upon this question.

In my opinion it is not according to the proper reading of this fifth clause that the Insurance Office may demand a *post-mortem* examination in any case of alleged accident, and in the event of refusal may refuse to pay the sum contained in the policy. I am not prepared to affirm the proposition that under this condition we should decline to enter into an inquiry into the whole circumstances surrounding the death of the insured if a demand for a *post-mortem* examination had been made and refused, even although the demand was made not unreasonably upon the details so far as known and laid before the medical officer. I think it would still be open to the Court to consider the whole circumstances in order to ascertain whether the death was caused by accident or disease. I think the Lord Ordinary was right in allowing evidence to be led upon the whole cause, and I am of opinion that the evidence shows that this death was caused by drowning, and shows it in a manner to the exclusion of all reasonable doubt.

If the evidence had appeared to me to suggest that there was any reasonable doubt as to the manner of death, which a *post-mortem* examination would have cleared up, and ought to have been used to clear up, I should have come to the conclusion that the cause of death was not proven, and I should take into consideration the fact that a request for a *post-mortem* examination was made and refused. But I repeat from the true import and effect of the evidence it is plain that the assured's death was caused by drowning, and there is no ground for suspicion or doubt which a *post-mortem* examination ought to have dissipated. I think, therefore, the first plea-in-law for the defenders ought to be rejected, for the reason that the facts proved by the evidence in the case do not support it, as no request was refused by the pursuers which the defenders were entitled to ask for, and the second because I am of opinion that it is proved by the evidence for the pursuer that the assured's death was by drowning.

LORD RUTHERFURD CLARK—I think that it is proved beyond all doubt that the deceased died by accidental drowning.

It is said that the defenders demanded a *post-mortem* examination, and that the pursuer was bound to furnish it as a condition-precedent to her recovery under the policy. It is a sufficient answer that the defenders did not demand it from the pursuer or from any person entitled to represent her. But I may add that if the demand had been made, I have the gravest doubt whether the defenders were under the fifth condition entitled to make it. It was to my mind an unreasonable demand.

LORD TRAYNER—I am of opinion that the proof in this case establishes beyond reasonable doubt that the late Mr Ballantine met his death through accidental drowning, and that no evidence of the cause of death which the defenders could reasonably demand was refused to them. I offer no opinion on the question whether the construction put by the defenders on the fifth condition endorsed on the policy is or is not sound, but I agree in thinking that even if that contention were affirmed, the defenders can take no advantage from it, because, as the Lord Ordinary has found, the demand made by them for a *post-mortem* examination was not made or addressed to the deceased's legal representatives.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Reclaimers—Jameson—Salvesen. Agents — Emslie & Guthrie, S.S.C.

Counsel for the Respondent—Shaw—W. Campbell. Agents—Carmichael & Miller, W.S.

Tuesday, December 19.

FIRST DIVISION.

[Sheriff of Dumbarton.

MAIN *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

Process—Competency of Appeal—Sheriff—Railway Accommodation Works—Railway Clauses Consolidation (Scotland) Act 1845, *sec.* 61.

The 61st section of the Railway Clauses Consolidation (Scotland) Act 1845 provides that "if any difference arise respecting the kind or number of any such accommodation works" as the railway company is bound to make, "the same shall be determined by the Sheriff." . . .

Held that it is incompetent to appeal to the Court of Session against an order pronounced by a sheriff or sheriff-substitute under this section.

The Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), by sec. 61 provides—"If any difference arise respecting the kind or number of any such accommodation works" (as the railway company are bound under section 60 to make for the accommodation of the owners and occupiers of lands adjoining the railway) "or the dimensions or sufficiency thereof, or, respecting the maintaining thereof, the same shall be determined by the sheriff or two justices, and such sheriff or justices shall also appoint the time within which such works shall be commenced and executed by the company.

Section 150 provides—"In all cases which may come before any sheriff-substitute under this or the Special Act, or any Act incorporated therewith in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such sheriff-substitute, to appeal against the same to the sheriff of the county by lodging a minute of appeal with the sheriff-clerk of such county or his depute, and the said sheriff shall thereupon review the proceedings of the said sheriff-substitute, and whole process, and, if he thinks proper, hear the parties *viva voce* thereon, and pronounce judgment, and such judgment shall in no case be subject to review by suspension or advocation, or to reduction on any ground whatever."

Thomas Main, market gardener, Milton, near Bowling, and the Lanarkshire and Dumbartonshire Railway Company having differed as to the accommodation works to be provided for Main's flower and fruit garden, Main presented a petition to the Sheriff at Dumbarton praying him to determine the matter.

The railway company lodged answers, but no record was made up.

The Sheriff-Substitute (GEBBIE) visited the ground accompanied by a civil engineer, and there heard explanations of parties, but no evidence was taken in writing.

Thereafter on 9th August 1893 he issued an order determining the accommodation works which the railway company were bound to make, and ordaining the same to be begun within thirty days and executed within nine months.

Against this order the Railway Company appealed to the Court of Session.

When the case came on for hearing the petitioner and respondent submitted that the appeal was incompetent, and argued—The Sheriff was invoked *qua* local administrator and not *qua* judge—*Glasgow District Subway Company* v. *Corporation of Glasgow*, November 8, 1893, 31 S.L.R. 70; and *Strain* v. *Strain*, June 26, 1886, 13 R. 1029; Deas on Railways, Appendix, p. cx., says the jurisdiction is exclusive, and certainly no appeal has been brought since the passing of the Act nearly fifty years ago. See also Browne & Theobald on Railways (2nd ed.) p. 278, and case of *Hood* v. *North-Eastern Railway Company*, 11 Eq. 116, 40 L.J., Ch. 17, there cited.

Argued for the appellants—(1) The Sheriff was here appointed to act *qua* judge in order to settle differences. If the Legislature had intended arbitration they would have appointed a man of skill. In the *Glasgow Subway* case the Court held the Sheriff was in fact appointed to act as an arbiter, and in *Strain's* case appeal was found incompetent because of the summary nature of the proceedings. (2) Where new jurisdiction was conferred on the sheriff it was with all the usual rights of appeal unless otherwise provided—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130; Ersk. Inst. i. 2, 7; and i. 3, 20; *Tennent* v. *Crawford*, January 12, 1878, 5 R. 433; and *Marr & Sons* v. *Lindsay*, June 4, 1881, 8 R. 748 (Bankruptcy Cases). (3) *Brown* v. *Edinburgh & Glasgow Railway Company*, March 15, 1864, 2 Macph. 875, showed that the Court of Session entertained such questions as the present by advocation, and therefore now by appeal. [LORD PRESIDENT—Suppose the order had been pronounced by two justices?]—It would have been subject to review by the Court of Session under the old method of procedure by suspension or advocation—*Buchanan* v. *Towert*, March 10, 1754, Mor. 7347; *Guthrie* v. *Cowan*, December 10, 1807, F.C.; *Anderson* v. *Campbell*, February 28, 1811, F.C.; and