The Court pronounced this interlocutor—

"The Lords (along with Lord Hunter, who presided at the trial) refuse the bill; disallow the exceptions; of consent apply the verdict found by the jury on the issue in the cause, and in respect thereof assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses, and remit," &c.

Counsel for Pursuer—Sandeman, K.C. —MacRobert. Agents—Connell & Campbell, S.S.C.

Counsel for Defenders—Watt, K.C.—Macmillan, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Thursday, January 24.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

HERBISON *v.* M'KEAN.

Sheriff—Poor's Roll—Application for Admission—Reporters on Probabilis causa litigandi—Poor's Agents—Poor's Agents Acting in Double Capacity in Same Action both as Agent for Party and as Reporter —Competency—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *Sched. I, Rule* 163.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—"First Schedule, Rule 163.—The Sheriff shall remit the application [for the benefit of the poor's roll] to the procurators for the poor, who shall notify the parties, and after inquiry shall make a report to the Sheriff."

It is incompetent in the Sheriff Court for a poor's agent to act as a reporter on the *probabilis causa litigandi* in an action where he is acting as poor's agent for one of the parties.

May M'Kean, Yoker (*respondent*) presented a petition in the Sheriff Court at Dumbarton for the benefit of the poor's roll for the purpose of prosecuting an action against James Herbison, Dalmuir (*appellant*). Mr Andrew Duncan, one of the agents for the poor, acted as agent for the petitioner, and as such signed the petition. On 17th December 1912 the Sheriff-Substitute (M'DIARMID) remitted "to any two of the agents for the poor to inquire and report as craved," and on 24th December 1912 Mr Duncan, along with Mr Kenneth S. Mackenzie, another of the agents for the poor, considered the application in the capacity of reporters on the *probabilis causa litigandi*, and reported as follows:—

"*Report.*—At Dumbarton the 24th day of December 1912. Appeared the defender, with John Lawrie, writer, Clydebank, as agent for him, and in presence of the undersigned agents for the poor, who, after due inquiry into the pursuer's cause, report that the pursuer has a probable cause of action and is entitled to the benefit of the poor's roll.

"AND. DUNCAN, *Agent for the Poor.*

"KENNETH S. MACKENZIE."

Thereupon the Honorary Sheriff-Substitute (HENDERSON), by interlocutor dated 30th December 1912, appointed Mr Duncan, "one of the agents for the poor, to take charge of the pursuer's cause and conduct the same to its final issue."

The defender appealed to the Second Division of the Court of Session, and on the case appearing in the Single Bills objected to the admission of the pursuer to the poor's roll on the ground that one of the two reporters on the *probabilis causa litigandi* who had considered the pursuer's application and reported in favour of her admission was the agent who was acting for her at the time.

The Court, which consisted of the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE, pronounced this interlocutor—

"Find that the proceedings before the agents for the poor on the remit to them by the Sheriff-Substitute were irregular and incompetent, in respect that the agent for the applicant was one of the two agents who reported in favour of the admission of the applicant: *Hoc statu* recal the interlocutor of 30th December 1912, and remit the petition to the Sheriff to remit of new to the agents for the poor to inquire and report and thereafter to proceed as accords."

Counsel for the Appellant—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondent—W. A. Fleming. Agents—Shield & Purvis, S.S.C.

Saturday, January 25.

SECOND DIVISION.

(Before Seven Judges.)

[Sheriff Court at Alloa.

ALLOA COAL COMPANY, LIMITED *v.* DRYLIE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c* 58), *sec.* 1 (1)—*Injury by Accident—"Accident" — Pneumonia following Chill Caused by Partial Immersion in Water.*

A pump in a wet pit having been stopped in order to repair a defect, water accumulated in the pit bottom and rose to the knees of certain miners, who in consequence of the rising water had left their work, and were waiting for the cage to take them to the pit-head. One of the miners in consequence of this immersion contracted a chill, on which, after he had done some work on three subsequent days, pneumonia

ensued, from which he ultimately died. *Held* (*diss.* Lord Salvesen) that the contraction of pneumonia in such circumstances might be an injury by accident in the sense of the statute, and consequently that there was evidence on which the arbiter could find that the workman's death was due to accident.

Per Lord Dundas—"I think one may postulate as a result of all the decisions that you must have a definite accident of some sort—not necessarily an occurrence extraneous to the workman—involving something unusual, unexpected, and undesigned, to which the injury or death can be unequivocally—or at least by a reasonably inferred train of causation in fact—attributed; and also probably, as a corollary, that death from disease—apart from the industrial diseases specially mentioned in the Act of 1906 and subsequent statutory rules and orders—is not an 'accident' unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising at an ascertained time out of the employment."

Mrs Margaret Walls or Drylie, widow of John Drylie, as an individual, and as tutrix and administratrix-in-law for her two pupil children, Jeanie Drylie and Robert Drylie, and John Drylie, another son of the deceased, *respondents*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from the Alloa Coal Company, Limited, *appellants*. The Sheriff-Substitute at Alloa (DEAN LESLIE), acting as arbiter, having awarded compensation, the Alloa Coal Company, Limited, appealed by way of Stated Case.

The Case stated—"The case was heard before me on 17th January 1912, the medical referee also being in attendance as assessor, and on 3rd February 1912 I found after advising with the medical referee, that the pursuers are the wife and children of the deceased John Drylie, and were dependent upon him; that John Drylie was a brushing contractor in the service of the defenders, forty-five years of age; that he was a healthy man; that his average weekly earnings were at least £2; that on 25th September 1911, while he was at work along with two other men in the defenders' Brucefield Pit, owing to a defect in the pump water began to accumulate at the pit bottom; that the pump was stopped in order that this defect might be remedied; that the stoppage allowed the water still further to accumulate; that when the men found the water rising they became somewhat alarmed, and decided to leave their work and the pit; that they arrived at the pit bottom heated from the exertion of their work and their haste on the way to the shaft; that the cage did not descend for them in reply to their signals until they had stood for about twenty minutes at the pit bottom while the repair to the pump was being completed; that, while they were standing there the water rose two inches, until they were immersed up to the knees in icy cold water; that there was a draught of cold air falling down the shaft upon them; that they were severely chilled by this exposure; that on reaching the pit-head the deceased John Drylie remained hanging about for twenty minutes or half an hour; that he complained of chill on arrival at his house; that on the following day, Tuesday, 26th September, he suffered from cough, hoarseness, and pains, but went to his work; that he left his work early; that the next day, Wednesday, was an idle day, and he only left his house to arrange about his pay lines; that occasionally while quite well he did not remain a full shift in the pit; that on Thursday and Friday he was again at work, but not for the full shifts; that his cough continued during these days; that on Friday, 29th September, he was shivering, and complained of cold all over; that on Saturday, 30th September, he was seen by a doctor, who suspected pneumonia; that on Sunday, 1st October, the doctor was assured that he was suffering from pneumonia; that on 8th October John Drylie died of pneumonia; that the Brucefield Pit is a wet pit; that the workmen there generally get wet at their work; that John Drylie was exposed to wetting at his work on the days following 25th September; that it was unusual for water to accumulate in the pit to the depth of two feet; that it was unusual to repair the pump when men were at work in the pit; that the pneumonia from which deceased died was due to the chill which he received on 25th September; that his remaining at the pit-head in his wet condition, and his working on the days following, and his wetting on these days, had not a favourable effect upon the illness caused by the chill on 25th September; that the pneumonia from which deceased died was a natural sequence of the chill to which he was exposed on 25th September. On these facts, I found (1) that the death of the deceased John Drylie resulted from injury by accident arising out of and in course of his employment with the appellants; (2) that the respondents were entitled to compensation from the appellants in terms of the Workmen's Compensation Act 1906, to the amount of £265, 3s. 8d."

The *question of law* was—"Did the death of the deceased John Drylie result from injury by accident arising out of and in the course of his employment with the appellants?"

The case was heard by the Second Division, and in consequence of a difference of opinion on the Bench was thereafter appointed to be heard before Seven Judges.

Argued for the appellants—Accident was to be construed in the popular sense of the term, and there was nothing in the circumstances of this case which in ordinary popular language could be held to be an accident. The mere contracting of disease was not an accident—*Fenton* v. *J. Thorley & Company, Limited*, [1903] A.C. 443;

Clover, Clayton, & Company, Limited, v. *Hughes,* [1910] A.C. 242, 47 S.L.R. 885. There must be a definite occurrence to constitute an accident, and it must be possible to specify the day, place, and circumstances of its occurrence—*Eke* v. *Hart-Dyke,* [1910] 2 K.B. 677; *M'Millan* v. *Singer Sewing Machine Company, Limited,* December 7, 1912, 50 S.L.R. 220; *Martin* v. *Corporation of Manchester,* 1912, 28 T.L.R. 344, 5 B.W.C.C. 259; *Brintons Limited* v. *Turvey,* [1905] A.C. 230; *Ismay, Imrie, & Company, Limited,* v. *Williamson,* [1908] A.C. 437, 46 S.L.R. 699; *Ystradowen Colliery Company, Limited* v. *Griffiths,* [1909] 2 K.B. 533; *Kelly* v. *Auchinlea Coal Company, Limited,* 1911 S.C. 864, 48 S.L.R. 768. The cases of *Sheerin* v. *Clayton & Company,* [1910] 2 Ir.R. 105, and *Yates* v. *South Kirkby, &c., Collieries, Limited,* [1910] 2 K.B. 538, were inconsistent with the decisions and *dicta* of the House of Lords in the cases above cited. In any event, this accident did not arise out of the employment—*Blakey* v. *Robson, Eckford & Company,* 1912 S.C. 334, 49 S.L.R. 254; *Rodger* v. *Paisley School Board,* 1912 S.C. 584, 49 S.L.R. 413; *Butler* v. *Burton-on-Trent Union,* 1912, 5 B.W.C.C. 355. Pneumonia following on a chill was not a risk that arose out of the employment. The deceased's fellow-employees were subject to the same conditions, and this showed that it was something in the man rather than in the conditions of his employment which caused the trouble. Further, there was no evidence to warrant the arbiter's finding that death was due to the chill. There was *malum regimen* on the part of the deceased himself in waiting half an hour at the pit-head, and thus creating a risk not incidental to his employment—*Dowds* v. *Bennie & Son,* December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Chandler* v. *Great Western Railway Company,* 1912, 5 B.W.C.C. 254. The Appeal Court was not bound by the arbiter's conclusion unless there was reasonable ground on which he could have come to that conclusion—*Lendrum* v. *Ayr Steam Shipping Company, Limited,* December 5, 1912, 50 S.L.R. 173.

Argued for the respondents—The chill which was the immediate cause of the pneumonia in the present case was produced by an external and untoward event, and an injury produced in these circumstances was properly described as an accident. External lesion was not necessary to bring it within the definition—*Ismay, Imrie, & Company, Limited* v. *Williamson, cit. sup.* (heatstroke); *Yates* v. *South Kirby, &c., Collieries, Limited, cit. sup.* (nervous shock); *Warner* v. *Couchman,* [1911] 1 K.B. 351, [1912] A.C. 35, 49 S.L.R. 681 (frostbite); *Morgan* v. *Owners of s.s. "Zenaida,"* 1909, 25 T.L.R. 446; *Malone* v. *Cayzer, Irvine, & Company,* 1908 S.C. 479, 45 S.L.R. 351; *Etherington* v. *Lancashire and Yorkshire Accident Insurance Company, Limited,* [1909] 1 K.B. 591; *Stewart* v. *Wilsons & Clyde Coal Company, Limited,* November 14, 1902, 5 F. 120, 40 S.L.R. 80; *Clover, Clayton, & Company, Limited* v. *Hughes, cit. sup.; Fenton* v. *Thorley & Company, Limited, cit. sup.; Pugh* v. *London, Brighton, & South Coast Railway Company,* [1896] 2 Q.B. 248; *Kelly* v. *Auchinlea Coal Company, Limited, cit. sup.* In the cases quoted *contra* by the appellant there was no unusual occurrence. There was further a complete chain of causation between the breaking of the pump and the death of the man, and his death was the result of the accidental wetting he received in consequence thereof, even though it might not be the natural or probable consequence thereof—*Dunham* v. *Clare,* [1902] 2 K.B. 292; *Golder* v. *Caledonian Railway Company,* November 14, 1902, 5 F. 123, 40 S.L.R. 89; *M'Innes* v. *Dunsmuir & Jackson,* 1908 S.C. 1021, 45 S.L.R. 804; *Dunnigan* v. *Cavan & Lind,* 1911 S.C. 579, 48 S.L.R. 459; *Kelly* v. *Auchinlea Coal Company, Limited, cit. sup.; Thorburn* v. *Bedlington Coal Company, Limited,* 5 B.W.C.C. 128; *Stapleton* v. *Dinnington Main Coal Company, Limited,* 5 B.W.C.C. 602. The question in the present case was one of fact on which the arbiter was entitled to find as he did, and on which his decision was final—*Warnock* v. *Glasgow Iron & Steel Company, Limited,* March 2, 1904, 6 F. 474, 41 S.L.R. 359; *Spence* v. *William Baird & Company, Limited,* 1912 S.C. 343, 49 S.L.R. 278; *Mitchell* v. *The Glamorgan Coal Company, Limited,* June 7, 1907, 23 T.L.R. 588; *Hawkins* v. *Powells Tillery Steam Coal Company, Limited,* [1911] 1 K.B. 988; *Richard Evans & Company, Limited* v. *Astley,* [1911] A.C. 674, 49 S.L.R. 675; *"Swansea Vale"* (*Owners*) v. *Rice,* [1912] A.C. 238; *Grant* v. *Glasgow and South-Western Railway Company,* 1908 S.C. 187, 45 S.L.R. 128; *Coe* v. *Fife Coal Company, Limited,* [1909] S.C. 393, *per* the Lord President at p. 396, 46 S.L.R. 328; *MacKinnon* v. *Miller,* 1909 S.C. 373, 46 S.L.R. 299; *Euman* v. *Dalziel & Company,* 1912 S.C. 966, 49 S.L.R. 693, and 50 S.L.R. 143.

At advising—

LORD DUNDAS—This case seems to me to lie very near the line which separates liability and non-liability for compensation by an employer. The Sheriff-Substitute has decided that it lies on the side inferring liability, and I do not see any sufficient ground for disturbing his decision.

The difficulty of the case is to a large extent caused by the unsatisfactory way in which some of the findings are expressed, but the gist of the facts found may, I think, be summarised as follows—I quote the actual words where it seems advisable to do so. On 25th September 1911 the workman, John Drylie, a healthy man of 45, was engaged at his work in the appellants' Brucefield pit—a "wet pit," where the employees usually get wet at their work. Owing to a defect in the pump, water began to accumulate at the pit-bottom; the pump was stopped in order to repair it, and "the stoppage allowed the water still further to accumulate." The men becoming alarmed at the rising water decided to leave work and the pit, they reached the pit-bottom heated by the

exertion of their work and their haste, and the cage did not descend for them, in reply to their signals, until they had stood for about twenty minutes while the repair to the pump was being completed. The water, icy cold, rose up to their knees, and a draught of cold air was falling from the shaft upon them. "They were severely chilled by this exposure." On reaching the pit-head Drylie remained hanging about for twenty or thirty minutes; he "complained of chill" on arriving at his house; and on the 26th suffered from cough, hoarseness, and pains, but went to his work, which he left early. On the 27th, an idle day, he only left his house to arrange about his pay lines. On the 28th and 29th he was at work, but not for the full shifts, his cough continued during these days, and on the 29th he was shivering, and complained of cold all over; on the 26th, 28th, and 29th he was (as was usual) exposed to wetting at his work. On the 30th Drylie was seen by a doctor, who suspected pneumonia, on 1st October "the doctor was assured that he was suffering from pneumonia," and on 8th October he died of pneumonia. The arbiter further finds "that it was unusual for water to accumulate in the pit to the depth of two feet; that it was unusual to repair the pump when men were at work in the pit; that the pneumonia from which deceased died was due to the chill which he received on 25th September; that his remaining at the pit-head in his wet condition, and his working on the days following, had not a favourable effect upon the illness caused by the chill on 25th September; that the pneumonia from which deceased died was a natural sequence of the chill to which he was exposed on 25th September." On these facts the Sheriff-Substitute found that Drylie's death resulted from injury by accident arising out of and in the course of his employment with the appellants, and awarded compensation to his dependants. The question of law is, as too often happens, badly stated. It ought to have been in the form given in *Euman* (1912 S.C. 966), or in substantially similar words.

The appellants' counsel maintained that there was here no accident at all within the meaning of the Act, and alternatively that if there was such an accident there was no evidence to justify the arbiter in attributing the man's death to it.

The words "accident" and "personal injury by accident" occurring in the Act of 1906 and the earlier Act of 1897 have been frequently interpreted and applied by the Courts, and particularly by the House of Lords. In *Murray* v. *Denholm* (1911 S.C. 1087) I took occasion to examine with some care the pronouncements of the House upon this point, and I refer to my observations without repeating them. The guiding rules laid down by Lord Macnaghten in *Fenton* v. *Thorley & Company, Limited* ([1903] A.C. 443), and again in *Clover, Clayton, & Company* v. *Hughes* ([1910] A.C. 242), and repeatedly since adopted and re-affirmed by the House of Lords, would seem to be simple and clear enough to follow; but, as many subsequent decisions testify, it has not always been found easy to apply them consistently and satisfactorily to the manifold and varying circumstances which are constantly brought before the Courts. In a recent Irish case, not unlike the present in some respects, where the applicants were successful, the Lord Chancellor (Sir Samuel Walker) observed that "the word 'accident' has, when used in this statute, long ceased to have the meaning the man in the street would attribute to it"—*Sheerin* ([1910] 2 I.R. 105). But I think one may postulate as a result of all the decisions that you must have a definite "accident" of some sort—not necessarily an occurrence extraneous to the workman—involving something unusual, unexpected, and undesigned, to which the injury or death can be unequivocally—or at least by a reasonably inferred train of causation in fact—attributed; and also probably, as a corollary, that death from disease—apart from the industrial diseases specially mentioned in the Act of 1906 and subsequent statutory rules and orders—is not an "accident" unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising at an ascertained time out of the employment. Examples of an "accident" where there was no "extraneous occurrence" are seen in *Fenton* (*cit.*), *Clover, Clayton, & Company* (*cit.*), and *M'Innes* (1908 S.C. 1021). The necessity for a sufficient train of causation in fact, though not necessarily as matter of natural or probable sequence, is illustrated, *e.g.*, in *Malone* (1908 S.C. 479), *Durham* ([1902] 2 K.B. 292), and *Ystradowen Colliery Company, Limited* ([1909] 2 K.B. 533). Cases in which death from disease was held to have been caused or sufficiently contributed to by personal injury by accident are found in, *e.g.*, *Brintons Limited* ([1905] A.C. 230), *Dunnigan* (1911 S.C. 579), and *Kelly* (1911 S.C. 864); while a contrary result is illustrated, *e.g.*, by *Eke* ([1910] 2 K.B. 677), *Steel* ([1905] 2 K.B. 232), and *Broderick* ([1908] 2 K.B. 807). *Kelly's* case has some features of special similarity to the present. The workman's death was caused by pneumonia, contracted owing to inhalation of carbon-monoxide gas in a mine. There was also an incident of delay in cold and draught at the pit-bottom. It appeared that death from pneumonia was not a usual occurrence from blastings generating the gas—it was apparently unprecedented—but on this occasion a lethal dose had been unexpectedly generated and administered to the workman. The Court declined to interfere with the arbiter's decision in favour of the applicants. If *Kelly's* case was rightly decided, as I think it was, it seems to carry the respondents here a long way towards success. The circumstance of Drylie finding himself immersed to the knees in icy-cold water was abnormal. It in its turn was, as matter of fact, due to an abnormal cause—the stopping of the pump while men were at work in the pit; and if the pneumonia

of which he died was in fact caused by his immersion, I think the elements of an "accident" are here present. That the immersion and its consequences arose out of as well as in the course of his employment seems clear enough. The man when at his work in the pit left his place owing to the rising water, and had to go to the pit-bottom for his means of exit from the pit. Now whether or not the pneumonia which caused Drylie's death resulted directly from his having been "chilled" or having "contracted a chill"—the two things are, I apprehend, pathologically distinct, but I take either hypothesis—is a question of fact. The arbiter, who heard medical evidence on both sides, and also had the advantage of the assistance and advice of a medical referee, found in fact "that the pneumonia from which deceased died was due to the chill which he received on 25th September." I think this finding must mean that the arbiter drew the inference from the evidence before him that the pneumonia (and death) resulted directly from the man's immersion in icy-cold water at the pit-bottom on the given date, and I cannot say that he could not competently so find. I am therefore of opinion, as I was after the hearing in the Second Division, that the appellants have failed to show cause for disturbing the arbiter's decision. I am keenly alive to the kind of danger which the Lord President has more than once alluded to when he spoke of the driving force of step-by-step decisions towards an ultimate point uncontemplated at the outset. But I do not think the present case, if determined as I think it should be, would mark any new departure in decision; and I take it that the Court will always find grounds for calling a halt when they are invited to proceed to extreme and unreasonable conclusions—*cf. M'Millan* v. *Singer Company, Limited*, 1912, 2 S.L.T. 484; *Spence*, 1912 S.C. 343. The present case could never be fairly cited in the future as indicating that the Court is willing to hold that a mere ordinary disease, *e.g.*, pneumonia, entitles a workman to compensation. The Court must be satisfied—or be unable to say that an arbiter had not on the facts ground upon which he might reasonably be satisfied—that the disease was attributable to some particular event or occurrence of an unusual and unexpected character, incident to the employment, which could in the light of the decisions be fairly described as an accident.

LORD JUSTICE-CLERK—When this case was heard before the Second Division the opinion I formed was in accordance with that now expressed by Lord Dundas. But there being a difference of opinion on the Bench, and the case being one relating to the application of the Act of Parliament to cases of injury suffered by causes which, as was expressed in the Appeal Court, were not such as would be called "accident" by the "man in the street," I thought it advisable, and my brethren concurred with me, that it would be right to have the case disposed of by a larger Bench. With the advantage of another debate from the Bar, and consultation with your Lordships who sat at the rehearing, my opinion in favour of the respondents has been confirmed. Lord Dundas has fully and clearly expressed the views which lead me to the conclusion I have formed, and I adopt them in every particular. I content myself with expressing my concurrence in his opinion.

LORD SALVESEN—This case is one of the most important that we have had to determine under the Workmen's Compensation Act, as it is the first in which an arbitrator has decided that a death which resulted from pneumonia ensuing on a neglected cold was a death resulting from injury by accident. Pneumonia is well known to be at present one of the most common diseases, and latterly it has become responsible for an increasing share in the mortality of the people of Scotland. The case therefore requires the most careful consideration, as if decided in accordance with the views of the Sheriff-Substitute it opens up an endless vista of litigation under the Workmen's Compensation Act, and would tend to extend its application to numerous cases which can scarcely have been contemplated by its framers.

The first question is whether the deceased miner suffered an injury by accident. In my opinion there was no accident in the sense in which the Courts have hitherto held that the word "accident" falls to be construed, *i.e.*, in its ordinary and popular acceptation. That there was an accident to the pumping machinery in the appellants' mine is perhaps true, and it is also true that in consequence there was a greater accumulation of water in the pit than was ordinarily met with even in this wet mine, where (as it is expressly found) the miners generally get wet at their work. But would anyone say in popular language that the deceased had met with an accident because he required to stand for some twenty minutes at the bottom of the pit in water which gradually rose so that he was ultimately immersed up to the knees? If so the other men who were with him at the time equally met with an accident, because they all stood in the pit-bottom during the same time and under exactly the same conditions. I cannot imagine that any of these men when they came to the pit-head would have so described their experience. It was argued that the decisions, especially some in the House of Lords to which we were referred, have extended the definition of "accident" so as to include an occurrence of this kind, but I do not think any of the cases cited is really in point, and I notice that even in the most recent the general rule prescribed for the guidance of inferior courts already referred to still holds it own. There is no case where a death from a disease such as pneumonia has been held to be a death resulting from an injury by accident because it might be with more or less probability attributed to an accidental exposure to wet or cold. In the case of *Etherington* ([1909], 1 K.B. 591),

it was held that the representatives of a man who was insured under an accident policy and who died of pneumonia in consequence of his having had a heavy fall on wet ground while hunting were entitled to recover under the policy. In that case, however, the decision was reached on considerations which cannot be taken into account in cases arising under the Workmen's Compensation Act—as, for instance, that the construction of the policy contended for by the insurance company would limit their liability in a way that could not have been contemplated by the other contracting party. Apart from this the decision appears to me to be well warranted by the fact that pneumonia immediately supervened on what undoubtedly in popular language would be described as an accident.

The only case decided in the House of Lords, so far as I am aware, where a death from disease not preceded by some direct lesion was held to be a death resulting from injury by accident, is the well-known anthrax case (*Brintons Limited* v. *Turvey*, [1905] A.C. 230). In that case there was a vigorous dissent by Lord Robertson, and the judges who formed the majority were careful to guard against the decision being extended to ordinary cases of disease. Thus Lord Lindley said—"I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act, and I concur with the observations made by Cosens Hardy, L.J., on this point at the end of his judgment;" and Lord Chancellor Halsbury said—"I so far agree with my noble and learned friend that I think, in popular phraseology from which we are to seek our guidance, it excludes and was intended to exclude idiopathic disease." The ground of the decision really was that the accident consisted in a particle of matter striking the man in the corner of his eye, and so causing some abrasion through which the infection was communicated to his body. It is true that the County Court Judge had found that there was no abrasion of the eye, but Lord Macnaghten pointed out that the medical evidence seemed to be that without some abrasion infection was hardly possible. The illustrations given by the Lord Chancellor are all of accidents in the popular sense, causing a wound and so permitting the entry into the body of the germs of erysipelas, tetanus, or the like. If so, this decision is quite in accordance with the principle given effect to in other cases, although its application to the particular facts might well have given rise to acute divergence of opinion. It is a different thing to say that because of the decision in *Brinton's* case we are to hold that pneumonia contracted by a workman in the course of his employment through some accidental exposure having occurred which made him more or less liable to contract the disease, is to be treated as an injury resulting from accident.

Let me illustrate what I mean by a few concrete cases. A workman is employed by his master to take a journey by train. He arrives at the station to find that his train has been delayed by an accident. He has to wait for some time, exposed it may be to wet or merely to a cold draught, and in consequence catches a cold which he neglects, and which ultimately produces pneumonia which carries him off. Could any reasonable person say that he had been injured by accident, or that his death had resulted from injury by accident? Again, a window is accidentally broken in a factory, and it happens to be a cold day outside. One of the workmen contracts a cold from a draught to which he is exposed owing to the window having been broken. Can it be affirmed that the cold was the result of an injury by accident? Similar illustrations might be multiplied; yet in all such cases, if we are to affirm the judgment of the Sheriff-Substitute, it will be open for the arbitrator to find, if he were bold enough to attribute the disease to a particular exposure resulting from some accidental occurrence, that it was the result of an injury by accident within the meaning of the Act. I do not know where the liability would stop if this principle were once recognised. It may be assumed that every workman who catches a cold must have been exposed to conditions which were somewhat out of the ordinary. If a wetting produced by a breakdown of a pump in a wet mine is an accident, although it produces no ascertainable effect upon the parts exposed, how can that be distinguished from a wetting resulting from a heavy rainfall which made the mine wetter than usual on the day on which the cold was said to have been caught? Or, again, suppose a miner had had to wait at the bottom of the pit somewhat longer than usual, owing either to the negligence of the men who worked it or to an unusual number of men having to be taken up on the particular day, and was exposed in consequence for some minutes longer than usual to the cold draught prevailing at such places, and he caught a cold which might or might not terminate fatally, can he or his representatives recover on the footing that he sustained an injury by accident? Great importance was attached by the respondents' counsel to the circumstance that there was in this case an accident to the pumping machinery. That appears to me to be an entirely irrelevant consideration. The question is whether the man met with an accident. It it true that if the water had risen so high that he had been drowned, or if hot water had escaped from a boiler used in the pit, and he had died from contact with it, his death would rightly be attributed to accident, but in each of these cases it would have been the result of some external agency, contact with which had produced an injury. Medical men tell us that pneumonia is caused by the multiplication of

the germs of the pneumococcus, which exist in the respiratory organs of most healthy people, but which is harmless until the vitality has been markedly impaired. These scientific theories are not common knowledge, and I think it would surprise the man on the street if he were told that a person who died from pneumonia, contracted, as that disease usually is, by exposure to cold, had died from accident. The case of traumatic pneumonia is in an entirely different position. It is exactly analogous to the cases referred to in the Lord Chancellor's opinion in *Brintons Limited.* The body suffers a lesion through which the poisonous germ effects an entrance. Here there was nothing of the kind. The men who were immersed up to their knees in cold water suffered no lesion, although in the case of one of them his vitality may have been reduced by the exposure. I am therefore quite unable to reach the conclusion that the deceased met with an accident which caused him an injury, or that the pneumonia resulted from injury by accident within the meaning of the statute.

I have kept in view in these observations the decision of the Extra Division in the case of *Kelly* (1911 S.C. 864). The ratio of this decision is not necessarily in conflict with the conclusion at which I have arrived, although I should not myself have reached the same conclusion as the Extra Division. In that case the accident which caused the man's death was the direct result of his lungs having been exposed to a dose of carbon monoxide gas. The disease was thus set up by an external agency which operated directly on the part of the body in which it was produced. Lord Kinnear in that case says that the word accident implies "some external act which could be the subject of a notice to the employer . . . . Therefore you have to look for some external fact, distinct from the idiopathic condition of the man himself, which can be described as an unforeseen and undesigned occurrence causing injury to the workman. Here the deceased's legs were the only parts of his body which came in contact with the only external agency that can be postulated, viz., a quantity of cold water. If these legs had in consequence got inflamed, or if the water had been corrosive in its character, there would perhaps have been an injury by accident, but the legs were in no way injured, although the fact that the man suffered from cold feet may have exposed him to certain risks of catching disease which he might otherwise have escaped. The cases are therefore essentially distinct, although it was a peculiarity of *Kelly's* case that the poisonous gas which pervaded his lungs was in itself inert, and operated by preventing or obstructing such aeration of the blood as was necessary to combat the disease.

If the circumstances above described constitute an accident, then I do not think there can be much doubt that it arose not merely in the course but also out of the employment. There remains, however, the question whether there was evidence from which the Sheriff-Substitute could legitimately infer that the death of John Drylie resulted from an accident. After the general narrative of facts there are two findings which it is somewhat difficult to construe. The Sheriff-Substitute found that the "pneumonia from which the deceased died was due to the chill which he received on 25th September," and also at the very end of his narrative "that the pneumonia from which the deceased died was a natural sequence to the chill to which he was exposed on 25th September." I think these two findings must be read together, and that they amount to this, that as the pneumonia was a natural sequence of the chill the Sheriff-Substitute considered himself entitled to find that the chill was in fact the cause of the deceased's death. There are, no doubt, circumstances in which this disease follows so immediately on an unusual exposure as to justify the inference that the exposure caused the disease. No difficulty on this score could arise in the case of *Etherington*, but the remaining facts found by the arbitrator here show that the present case does not belong to this simple category. After getting to the pit-head the deceased loitered for twenty minutes on the surface before going home. On the following day he suffered from the symptoms of a severe cold, but went to his work, which he left early; that the next day — Wednesday — was an idle day, but Drylie was again out of his house to arrange about his pay-lines; that on the two following days he was again at work but not for the whole shifts; that on Friday, 29th September, he was shivering and complained of cold all over, but that it was not until 1st October that the doctor who saw him, and who on the previous day had suspected pneumonia, was satisfied that he was actually suffering from that disease. On 8th October he died. I confess that the circumstances suggest to my mind nothing more than that the man caught a cold on 25th September, presumably as the result of the exposure; that he absolutely neglected it, and it was only after four or five days of such neglect that the pneumonia set in. To loiter at the pit-head without occasion for twenty minutes or half an hour after he had been standing in icy cold water, and to work in this wet pit on three out of the four following days, during each of which he was exposed to a wetting at his work, seems to have been grossly inprudent for a man who was suffering from a severe cold. No doubt the arbitrator had the benefit of the advice of a medical assessor, but he has narrated all the material facts on which he relied for his own conclusion, and we are just as able to draw an inference ourselves as he was. It may be matter of reasonable conjecture that the disease from which he died commenced with a cold which he caught on 25th September, but it is just as reasonable to conjecture that if he had gone straight home after his wetting, or had not gone to his work the rest of the week, nothing more

serious would have happened. The Sheriff-Substitute has found that his so working had not a favourable effect upon the illness, which he thinks commenced on 25th September—a negative way of stating what happened in the interval which does not do full justice to the facts. The pneumonia itself did not develop for nearly a week, and I do not think the inference which the arbitrator drew was warranted by the facts he has stated; unless indeed the fact that a man has caught a cold during his work from which he never recovers until pneumonia supervenes is a ground for inferring that the circumstances which produced the cold also produced the supervening pneumonia, however long the interval that elapsed. In my opinion the arbitrator was not entitled to find anything more than that the exposure on the 25th September led to the deceased taking a cold which, like any other cold if neglected—as it was in the present case—might have serious consequences. In my opinion we ought to answer the question of law in the negative.

LORD MACKENZIE—In my opinion there is sufficient in this case to justify the arbitrator in reaching the conclusion he did. I confess that I have all along felt that the difficulty in this case lay in the facts and not in the law. Like many other cases which we have had to consider, there is a difficulty in the application of the law to the facts, and therefore I state quite shortly what I think the true view of the facts found by the arbitrator is.

He finds, in the first place, that the workman died on 8th October from pneumonia, and, as I read his findings, he also finds in fact that the pneumonia was directly caused by what occurred on 25th September, that what happened on that day was an unintended and unexpected occurrence which caused hurt or loss, and that that unintended and unexpected occurrence consisted in an unusual accumulation of water, which alarmed the men who were working there and induced them to hasten to the pit-bottom. I may remark here in passing that I do not think miners drop their graith and run for nothing, and the circumstances of this case are in marked contrast to one of the illustrations that have been given—that of a heavy shower of rain. The men ran to the bottom, and while they were waiting there the water rose upon them and they were immersed up to their knees, and were chilled by exposure to the water and to the air.

Now it appears to me that according to the law which has been laid down in many cases, both in the House of Lords and here, that is a case of injury by accident arising out of and in the course of employment. You can give the time, you can give the day, you can put your finger on the circumstances and the place of the occurrence of a definite event by which injury was caused to the workman. The facts in this case are in marked contrast to those in *M'Millan* v. *Singer Sewing Machine Company*, which was decided by this Division on 7th December 1912, where we refused to hold that where a man merely caught cold that entitled him to compensation under the Act. In that case the line was drawn, and we held that the claimant had failed to make any relevant averment of an occurrence. Here there was.

As regards the law, I confess that I do not think any good purpose is to be served by reviewing the various cases. I am content for my part to refer to what has been said by the Lord President in the case of *Euman* v. *Dalziel & Company*, by Lord Kinnear in the case of *Kelly* v. *Auchinlea Coal Company*, and to the law as explained in *Eke* v. *Hart Dyke*.

LORD GUTHRIE concurred in the opinion of LORD DUNDAS.

LORD PRESIDENT—I have had the advantage of reading the opinion which has been delivered by Lord Dundas, and I concur in that opinion in all its parts, and therefore do not think it necessary to attempt any review of the cases.

If this were a new question and we were deciding it for the first time, I think there would be great force in much of what Lord Salvesen has said. I do not hesitate to say that if I had been sitting in the House of Lords in the case of *Brintons* I think I should have voted with Lord Robertson, and if I had been there in the case of *Ismay* I certainly should have voted with Lord Macnaghten. But sitting in this Court I am bound to take the cases as I find them and—whatever my own opinions may be—to follow loyally the doctrine that has been laid down by the House of Lords.

Now I think that that doctrine may be stated in a single sentence, and it is this—The fact of disease is not an accident, but the contraction of disease may be by accident. When you seek to apply that doctrine to the question in the present case, namely, Was this disease of which the man died contracted by accident? it seems to me you have to answer two questions. The first question is—Was it contracted in consequence of what happened on the 25th September? Or is it impossible to say when and where it was contracted? Now upon that matter I agree the evidence is very thin. But here we are not actually deciding upon the evidence. What we have got to decide is — Was there evidence upon which the arbitrator could reasonably come to the conclusion that it was contracted in respect of what happened on the 25th September? Well I cannot say there was not. I think he was entitled to come to that conclusion, although personally I should perhaps have hesitated to do so.

The next question is—Was that which happened on the 25th September an "accident" in the sense of the statute? I think it was, because, to use the words of Lord Macnaghten in *Fenton* v. *Thorley & Company, Limited*, it was "an untoward and unexpected event." Accordingly upon the whole matter I agree with the majority of your Lordships.

LORD KINNEAR, who was absent at the advising, gave no opinion.

The Court found in answer to the question of law stated in the case that there was evidence upon which it could be competently found that the death of the deceased John Drylie resulted from injury by accident arising out of and in course of his employment; therefore affirmed the award of the arbitrator, and decerned.

Counsel for Claimants and Respondents —D.-F. Dickson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Defenders and Appellants —Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Wednesday, January 29.

SECOND DIVISION.

[Lord Cullen, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* SYMINGTON.

(*Reported ante*, 1911 S.C. 552, 48 S.L.R. 539; 1912 S.C. (H.L.) 9, 49 S.L.R. 49; 1912 S.C. 1033, 49 S.L.R. 751.)

Process — Proof — Diligence to Recover Writs—Confidentiality—Letters Passing between Party's Law Agents and Arbiters, Engineers, Contractors, and Officials—Statement of Fact.

A railway company brought an action of suspension and interdict against the lessee of a freestone quarry to interdict him from quarrying the freestone under land which the company had purchased under the Railways Clauses Consolidation (Scotland) Act 1845. The respondent averred—"In selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act," and sought a diligence to recover excerpts from the letter books of the complainers' law agents of all letters which contained references to freestone as a mineral, written in connection with similar sales of land and passing between the complainers' law agents and the arbiters in arbitration proceedings relating to such sales, and between the complainers' law agents and the complainers' engineers, contractors, and officials. The complainers objected to the diligence on the ground that the letters were confidential.

The Court, in the circumstances, *granted* the whole diligence, expressly reserving for the Lord Ordinary the question of the confidentiality of any excerpt to be made by the commissioner.

The Caledonian Railway Company, *complainers*, brought an action of suspension and interdict against Hugh Symington, contractor and quarrymaster, Coatbridge, *respondent*, to interdict the respondent from quarrying the freestone under land which the complainers had purchased under the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33).

The respondent averred—"In selling and purchasing respectively the land in question both the sellers and the complainers treated with each other, in respect of the said freestone rock, on the footing that it was admittedly a mineral within the meaning and for the purposes of the said Railways Clauses Act"—see *previous report*, 1911 S.C. 552, at p. 554, 48 S.L.R. 539, at p. 541.

The Lord Ordinary (CULLEN) allowed a proof, and after sundry procedure—see especially *previous report*, 1912 S.C. 1033, 49 S.L.R. 751—on 19th December 1912 granted a diligence to the respondent for the recovery of the documents contained in article I, heads 1 and 2, and article 3 of the following specification, disallowing the other articles:—

"1. All letter-books and business ledgers kept by or on behalf of Hope, Todd, & Kirk, W.S., Edinburgh, and their predecessors in business, Hope & Oliphant; Hope, Oliphant, & Mackay; Hope & Mackay; Hope, Mackay, & Mann; and Hope, Mann, & Kirk, all Writers to the Signet, Edinburgh, that excerpts may be taken therefrom of (1) the letters by the said Hope, Oliphant, & Mackay to Robert Elliot, Ecclefechan, dated 4th June 1850, 23rd October 1850, and 2nd November 1850; and (2) all other letters passing between the said Writers to the Signet or anyone on their behalf, as agents for the complainers, and the said Robert Elliot, Horn, and any other arbiters, oversmen, or clerks (or anyone on their behalf) acting in arbitrations between the complainers and the proprietors after mentioned, containing references to freestone as a mineral or otherwise, and tending to show whether the complainers regarded freestone as a mineral or otherwise in dealing with said proprietors and their claims, or containing instructions regarding claims made by said proprietors in respect of freestone or sandstone acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of their railways, or in any way relating to such claims, or the arbitration proceedings following thereon, viz.—(*a*) the proprietors of Woodhouse estate between the years 1845 and 1868; (*b*) the proprietors of the following estates, namely—(1) Burnfoot, (2) Kirkpatrick, (3) Cove, (4) Barncleugh, (5) Longbedholm, and (6) Mossknowe, between said years; and (*c*) the proprietors of Mount Annan estate between the years 1845 and 1875; and (3) all entries in any way relating to such instructions to said arbiters, oversmen, and clerks in arbitrations, or to communications to or meetings with them with reference to such claims and arbitration proceedings between said respective dates.

"2. All letter-books and business ledgers kept by or on behalf of Hope, Todd, & Kirk,