injury to the cargo largely in excess of the freight sued for. The trustee honestly believes that the claim of damages is unfounded, and that it is his duty to prosecute the action. The contrary is found by the Court; and according to the pursuer not merely must the trustee fail in his action, but because he brought it he must be held to have adopted the charter-party to the effect of becoming personally liable for all the shipowner's obligations under the contract of carriage. One is not surprised to find that there is no authority for such a proposition. Apart from the cases upon current leases to which I have already referred, the nearest analogy was said to be found in the liability of a trustee to pay the expenses of an unsuccessful action against the bankrupt to which he has sisted himself as a party. The reason for this liability, according to the pursuer, was that he had adopted the contract of litiscontestation. This so-called contract is a mere legal fiction for which no doubt there is respectable authority, but it is not upon this ground that the trustee is rendered personally responsible for such expenses. It is because he has elected to sist himself as a party to the litigation, and so must incur all the risks of an ordinary litigant. He has, in short, taken control of the pending suit, which but for his action would at once have been decided adversely to the bankrupt. There is really no analogy between such a case and that with which we are now dealing. The decision most strongly founded on,—that of *Malcolm* v. *Craig's Trustee*,—was not one where the personal liability of the trustee was in issue. The sole question was whether the landlord was entitled to set arrears of rent against a claim by the trustee for the price of certain sheep stock as determined by the valuation of arbiters, which in terms of a clause in the lease he had insisted that the landlord should take over at valuation. The true ground of judgment was thus stated by Lord Moncreiff in a single sentence—"He thus appealed to the contract, and having done so he cannot enforce the claim which he has thus obtained against the landlord without satisfying or giving credit for the landlord's counter-claims under the same contract." That is merely an application of a principle which was given effect to in somewhat similar circumstances in the case of *Dingwall* (1912 S.C. 1097). The point now raised might have arisen in *Malcolm's* case if the valuation of the sheep stock had been less than the arrears of rent due to the landlord, but the decision gives no countenance to the view that in such circumstances the trustee would have been held personally liable for the difference. I am therefore of opinion that the unsuccessful action of the trustee founded upon the contract contained in the minute of dissolution did not constitute an adoption by him of that agreement so as to infer personal liability. The trustee is therefore entitled to be assoilzied from the conclusions so far as directed against him as an individual, and as no question has been raised with regard to his liability as trustee, the action *quoad ultra* should be dismissed. The pursuer must, of course, pay the expenses of this action.

LORD DUNDAS, LORD GUTHRIE, and the LORD JUSTICE-CLERK concurred.

The Court recalled the interlocutor of the Lord Ordinary assoilzied the defender from the conclusions of the action so far as directed against him as an individual, *quoad ultra* dismissed it.

Counsel for the Pursuer and Reclaimer—Chree, K.C.—D. P. Fleming. Agents—Purves & Simpson, S.S.C.

Counsel for the Defender and Respondent—Solicitor-General (Anderson, K.C.)—Kemp. Agents—Wylie, Robertson, & Scott, Solicitors.

Friday, January 31.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

PONTON'S EXECUTORS *v.* PONTON.

Sheriff — Jurisdiction — Reconvention — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 6 (*h*).

The Sheriff Courts (Scotland) Act 1907 enacts—Section 6—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (*h*) where the party sued is the pursuer in any action pending within the jurisdiction against the party suing."

Held that a foreigner, who as sole surviving executor on a Scottish estate was suing in the Sheriff Court the executors on another Scottish estate, was not subject to the jurisdiction of the Court *ex reconventione* in an action at their instance against him as an individual.

Opinion (*per* Lord Salvesen) that to found jurisdiction in the Sheriff Court under the Sheriff Courts (Scotland) Act 1907, section 6 (*h*), it was not necessary that the actions should be *ejusdem generis*.

John Watson M'Crindle, LL.D., Westcliffe-on-Sea, Essex, and another, the trustees and executors of the late Mrs Jane Maclean or Ponton, who resided at Westcliffe-on-Sea, Essex, *pursuers*, brought an action in the Sheriff Court at Edinburgh against Archibald Campbell Ponton, Guildford Road, Tunbridge-Wells, *defender*, for payment of certain sums alleged to be due by him to Mrs Ponton's estate. Pursuers claimed that the defender was subject to the jurisdiction of the Court *ex reconventione* by virtue of section 6, sub-section (*h*), of the Sheriff Courts (Scotland) Act 1907 (quoted *supra* in rubric) in respect that as sole surviving executor of the late Mungo Ponton, Bristol, he was pursuer in an

action then depending in the same Court against Mrs Ponton's executors for delivery of certain furniture, and failing delivery, for payment of a certain sum as the value thereof, or otherwise for payment of £100 in terms of a holograph acknowledgment by Mrs Ponton.

The defender pleaded, *inter alia*—(1) No jurisdiction.

On 11th December 1911 the Sheriff-Substitute (GUY) sustained the first plea-in-law for the defender so far as directed to jurisdiction alleged to be founded on reconvention.

The pursuers appealed to the Sheriff (MACONOCHIE), who on 22nd December 1911 adhered.

Note.—"I concur in the judgment of the Sheriff-Substitute with regard to the question of reconvention. I think that the plea is bad on two grounds. (*First*) The action at the instance of the defender on which the plea is founded was one for delivery of furniture, and failing delivery, for the value of the furniture, whatever that might be. This action is a pecuniary claim at the instance of the executors of a deceased person against the pursuer in the former action. I do not think that it can be said that those two claims arise *in eodem negotio*, or that they are *ejusdem generis*, and if that be so it is settled law that the plea founded on reconvention fails (*Thompson* v. *Whitehead*, 1862, 24 D. 331). (*Second*) I think that the pursuer in the former action was suing in a totally different capacity—that of executor—from that in which he is being sued here, and that being so I cannot hold that the jurisdiction can be upheld. How widely the two capacities differ from each other is shown by the cases of *Smith* v. *Stoddart*, 12 D. 1185, and *Turnbull* v. *Veitch*, 16 R. 1079, in which it was held that it was incompetent to amend a summons brought at the instance of a widow in her individual capacity to the effect of altering the instance so as to enable her to sue as executrix of her husband. In my opinion the jurisdiction could not have been sustained on the ground of reconvention before the passing of the Sheriff Courts Act 1907, and I cannot hold that that Act has made any alteration on the law with regard to that matter."

After certain further procedure the Sheriff-Substitute on 1st March 1912 dismissed the action.

The pursuers appealed, and argued—The defender was subject to the jurisdiction of the Court *ex reconventione* in virtue of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 6 (*h*). That section had been passed for the purpose of extending the Sheriff's jurisdiction and taking away the advantages which foreigners enjoyed simply through the fact that they were foreigners. The particular person suing before the Court was there as a physical person, altogether apart from his representative capacity, and the Court could exercise jurisdiction over him in a variety of ways. It was a question of physical and not legal personality—*Macadam* v. *Macadam*, July 3, 1873, 11 Macph. 860, *per* L.J.-C. Moncreiff at p. 862, 10 S.L.R. 543. The case of *Turnbull* v. *Veitch*, July 18, 1889, 16 R. 1079, 26 S.L.R. 752, founded on by defender, was different, because the pursuer in that case came into Court as an individual and then desired to add a plea in a representative capacity. The Sheriff's first ground for refusing to give effect to the plea of reconvention was bad both under the old law and the statute, because, taking the test of *Thomson* v. *Whitehead*, January 25, 1862, 24 D. 331, the two claims were *ejusdem generis*. Reconvention was not confined to cases of compensation or cases where actions could be conjoined—*Hurst, Nelson, & Company* v. *Spenser Whatley, Limited*, 1912 S.C. 1041, 49 S.L.R. 830. This case left the rule of L.J.-C. Inglis in *Thomson* v. *Whitehead*, *cit. sup.*, untouched, and therefore if this had been an action by the pursuer as an individual, there could be no question that he would have been subject to the jurisdiction. There would have been jurisdiction *ex reconventione* under the old law, but in any event there was jurisdiction under the extension of the old law by the Sheriff Courts (Scotland) Act 1907.

Argued for the defender—To sustain reconvention the pursuer, in the *actio conventionis* must be the same *persona* as the defender in the *actio reconventionis*, and that could not be predicated of the present pursuers and defender. The contention of the pursuers would render competent an action against the public trustee as an individual on the ground that he had brought an action in Scotland in his official capacity. The object of reconvention was that the debtor should not be compelled to pay without having an opportunity of establishing his own claim, provided the two claims were of such a nature that they could be fairly set against each other. This meant that the doctrine of reconvention was ultimately founded on compensation—*Turnbull* v. *Veitch*, *cit. sup.*; *Wilson* v. *Gloag*, June 27, 1840, 2 D. 1233; *Smith* v. *Stoddart*, July 5, 1850, 12 D. 1185; *Macfarlane* v. *Sanderson*, February 11, 1868, 40 S.J. 189; *Wilson* v. *Mackie*, October 22, 1875, 3 R. 18, 13 S.L.R. 8; *Longworth* v. *Yelverton*, November 5, 1868, 7 Macph. 70, 6 S.L.R. 22; *Allan* v. *Wormser, Harris, & Company*, June 8, 1894, 21 R. 866, 31 S.L.R. 698; Graham Stewart on Diligence, p. 107; Executors (Scotland) Act 1900 (63 and 64 Vict. cap. 55), sections 6 and 7. *Macadam* v. *Macadam*, *cit. sup.*, founded on by the pursuers, was the case of an intromitter with a trust estate and not of one deceased executor. The word "party" in section 6 of the Sheriff Courts (Scotland) Act 1907 meant the individual in the character in which he appeared in the action.

LORD JUSTICE-CLERK—I am glad that we carried the debate so far, because Mr Morison has said as much as can be said in support of his view. He has not, however, altered the impression I had from the first.

We now have it that the case is solely maintained on the Sheriff Courts Act 1907, and it is said that the definition of pursuers and the terms of sub-section (*h*) of section 6 make it perfectly plain that all the protection hitherto given to a party suing as executor, in the only Court in which he can sue, as regards his own personal estate, is gone. Now, in the first place, I should expect, if that were the intention of the Act, that it would be very clearly expressed and not left to be inferred from the general language of the clause. The real question is—whatever the Act may say about a "pursuer"—Is the party who is suing the same party who is being sued as a defender in the other case? Now if he is not suing for himself, but in the exercise of an official duty to sue, his own *persona* is not involved. The fact that something may be decerned for against him as an individual, such as expenses, does not alter the case. Any decree against him on the merits of the case can only be against him in his fiduciary capacity. As regards his liabilities his official position is quite different from his individual position, and when section 6 (*h*) speaks of a party suing I take it that "party" means person *as* he sues, *e.g.*, as executor or trustee. In a case such as this the executor is not as an individual a party to the suit at all. If Mr Morison's view is sound, then if a body of five or six trustees were under the necessity of suing here for something due to the trust estate, each trustee would be liable to an action for his own personal debts. I do not think any expression in the Act leads to this result. A foreign defender owes no obedience to the Scottish Courts unless he is found in the position of asking the Courts to give him its services for his own ends. On the contrary, here the foreign defender is fulfilling a duty he is called on to perform and can get no decree beneficial to himself, or such as will provide a money compensation in his own action. That being the state of matters I can see nothing to indicate that this has been changed in any way by the Act, and I cannot read those portions of sections 5 and 6 as necessarily implying any such result as is maintained by the pursuer.

LORD DUNDAS—I agree. The first plea for the defender is stated in two words, "no jurisdiction." I should like to say that that is not a proper way of stating the plea. A plea-in-law ought to be a proposition in law. The two words "no jurisdiction" were here designed to support two different legal propositions based upon separate grounds. I do not like such pleading.

The Sheriff-Substitute has sustained the defender's first plea so far as directed to reconvention, and it is now admitted that the other branch of the plea is out of the case. The learned Sheriff on appeal adhered, and thought that the plea was bad on two grounds. I prefer not to proceed on the first of these grounds. As at present advised, I should be disposed to differ from the Sheriff in regard to it; but it is unnecessary to say more about that, because I entirely agree with the second reason which he gives. He says—"I think that the pursuer in the former action was suing in a totally different capacity—that of executor—from that in which he is being sued here, and that being so, I cannot hold that the jurisdiction can be upheld." I think this view is plainly right, apart from the Sheriff Courts Act 1907. Indeed Mr Morison conceded that it was so, according to the law and practice before that Act, and based his argument on the Act alone. I do not think, however, that section 6 (*h*) has made any material alteration in the law upon the point we are dealing with. Reading the words according to their natural meaning, it seems to me that "the party sued"—viz., Mr A. C. Ponton as an individual—is not "the pursuer in" the "action pending," who is the executor of the deceased Mungo Ponton. The section, if it was intended to alter the law and practice, ought to (and presumably would) have made that plain, by using such words as "the party sued, in whatever capacity he is so sued." I am not satisfied that the statute intended to make or has made the sweeping change Mr Morison maintained it has. On these short and simple grounds I think we should affirm the interlocutors appealed against.

LORD SALVESEN—I am entirely of the same opinion on what forms the ratio of judgment in this case, viz., that it is not a ground of jurisdiction against an Englishman as an individual that he has in a representative capacity sued an action in a Sheriff Court of Scotland which is still in dependence. I think the reasons assigned by Lord Dundas are unanswerable, and I have nothing to add on that point.

I desire, however, to say with regard to the first ground on which the learned Sheriff has sustained the plea of no jurisdiction, that as at present advised I do not agree with him. I think, even under the law as we have to apply it in this Court as laid down in *Thompson* v. *Whitehead* (1862, 24 D. 331), and affirmed in *Hurst, Nelson, & Company* v. *Spenser Whatley, Limited* (1912 S.C. 1041, 49 S.L.R. 830), the two claims here would be held to be *ejusdem generis* if the actions had been between the same parties. But even if there had been any doubt on the matter, it is removed as regards actions in the Sheriff Court by section 6 (*h*) of the Sheriff Courts Act 1907, which confers jurisdiction "where the party sued is the pursuer in any action pending within the jurisdiction against the party suing." These words are so wide that they admit of no qualification, and amount to a practical abrogation of the restrictions affecting the jurisdiction *ex reconventione* of the Court of Session as defined in *Thompson* v. *Whitehead*. I think it right to make these observations for the guidance of the learned Sheriff, as the question is very likely to arise on some future occasion.

LORD GUTHRIE—I concur. As to the Sheriff's first ground of decision, I think he was perhaps misled by the fact that the action in which Mr Ponton is pursuer is,

in its present shape, not for delivery of furniture or for its value, but for payment of a sum of money from the executry estate. On the second ground Mr Morison argued, in the first place, on what he maintained was the probable intention of the Sheriff Courts Act of 1907, viz., the removal of all former restrictions on jurisdiction founded *ex reconventione*, and in the second place, on the meaning of the words of section 6 (*h*) of the Act read in light of the interpretation clause. He said that it was clear that at least one restriction was swept away, viz., that the claims must be *in eodem negotio* or *ejusdem generis*. On that point I do not think it necessary to express an opinion, because even if he is right it does not follow that all other restrictions are also swept away. It is still necessary to consider whether the requirement that the actions shall be between the same parties is also removed. As to this Mr Morison was not able to suggest any reason to make his contention probable, or any principle for the rule for which he contends. In *Whitehead's* case the Lord Justice-Clerk enunciated a principle the justice of which is obvious, but which is now inapplicable if Mr Morison's contention be sound, namely, that the foreigner is not entitled to recover money in the courts of this country from a subject of this country and refuse to furnish his antagonist with the means which may be necessary to enable him to pay his debt. The wording of the statute seems to me inconsistent with Mr Morison's contention. Taking the Act in its plain meaning, I am of opinion that the "party suing" in the one action is not the "party sued" in the other, in the sense in which these words are used in section 6 (*h*) of the Act. Mr Morison pointed out that the earlier action was one in which Mr Ponton had an interest not only as an executor but also as an individual; but that is a mere accident, and even so it might very well turn out that the whole executry estate was required for the payment of debts, and that in fact he had no individual interest at all.

The Court dismissed the appeal.

Counsel for Pursuers and Appellants—Morison, K.C.—Wark. Agents—P. Morison & Son, W.S.

Counsel for Defender and Respondent—Sol.-Gen. Anderson, K.C. — Hamilton. Agent—John S. Morton, W.S.

Thursday, January 30.

SECOND DIVISION.

[Sheriff Court at Hamilton.

JOHN WATSON, LIMITED *v.* BROWN.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—"*Accident*"—*Chill Followed by Pneumonia.*

One of a number of miners who, in consequence of a breakdown in a shaft of the pit, had been ordered to ascend to the surface, and who had been detained in an overheated condition for an hour and a-half at the foot of another shaft exposed to a down-draught of air, contracted a chill, on which pneumonia supervened, from which he subsequently died.

Held that there was no evidence on which the arbitrator could find that death was due to accident.

Alloa Coal Company, Limited v. *Drylie*, January 25, 1913, 50 S.L.R. 350, *distinguished.*

Mrs Margaret Coyle or Brown, widow of John Brown, miner, Rutherglen, as an individual and as tutrix and administratrix-in-law of her pupil children, *respondent*, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from John Watson, Limited, coalmasters, Cambuslang, *appellants*, the Sheriff-Substitute (HAY SHENNAN) at Hamilton, acting as arbitrator, awarded compensation, and at the request of the defenders stated a Case for appeal.

The Case stated—"1. The said deceased John Brown was in the employment of the appellants in No. 2 Pit, Gilbertfield Colliery, on 26th June 1911. On that day he started work as usual about 7 o'clock a.m. and seemed to be in his usual good health. 2. The place where the deceased worked was dry and had a good current of air passing through it. 3. Between 8 and 9 o'clock a.m., in consequence of a wreck in the shaft, all the men in the pit where Brown started work were ordered to ascend to the surface. 4. Brown and the men who were working beside him proceeded towards the shaft of No. 2 Pit, by which they were usually raised to the surface. Under ordinary circumstances they were raised within a short time of reaching the bottom. On this day they were met on their way by an official, who told them to proceed by the communication road to the shaft of No. 1 Pit. Here they had to wait at a mid-landing for about an hour and a-half until the men from the lower seam who usually ascended by this shaft had been raised. 5. No. 1 shaft is the downcast shaft for the air current which ventilates the pit, and the current of air which entered the workings at the mid-landing passed round Brown's working-place. No. 2 shaft is the upcast shaft. 6. The only evidence tendered regarding temperature related to 13th May 1912 (the day of the proof), when the