tected against a repetition of that wrong in Scotland. I am of opinion that that is a question which this Court has necessarily jurisdiction to entertain and to dispose of, and that it is immaterial that owing to the position taken up by the respondents it is necessary, in order to determine that question, to inquire incidentally whether or not the patent is valid.

In regard to the plea of *forum non conveniens* I think that what I have said shows that it is in no way applicable to a case of this kind.

I am therefore of opinion that the Court should refuse the reclaiming note and adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for the Complainers and Respondents—Salvesen, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Counsel for the Respondents and Reclaimers — Clyde, K.C. — Smith Clark. Agents—J. & D. Smith Clark, W.S.

Tuesday, January 31.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

THE LONDON AND EDINBURGH SHIPPING COMPANY *v.* BROWN.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1, *sub-sec.* (1)—*Accident Arising out of and in the Course of the Employment — Workman Killed while Voluntarily Attempting to Rescue Fellow-Workman.*

A steamship was lying moored to a quay in a dock discharging her cargo by cranes from the forehold, mainhold, and afterhold, under the superintendence of a stevedore who had contracted with the owners to unload the vessel. In his employment were a number of labourers, each of whom was appointed to work in connection with one of the holds, either on board the vessel or on the quay. A, who was employed on the quay to remove cargo discharged from the afterhold, and who did not require in the performance of his duty to go on board the vessel, was informed by a fellow employee that one of the workmen employed in the forehold was lying there in an unconscious condition. A immediately boarded the vessel, offered to attempt a rescue, and was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas.

A acted without instructions from and without the knowledge of the stevedore, who had already gone in search of rescue appliances.

Held that A met his death by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act 1897, sec. 1, sub-sec. 1—*diss.* Lord Kyllachy, who was of opinion that his death was not due to an "accident."

Expenses—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37)—*Stated Case —"Expenses of the Stated Case"—Expenses in Connection with Adjustment of Case.*

In an appeal on a stated case under the Workmen's Compensation Act 1897 the Court found the respondent entitled to "the expenses of the stated case." On the Auditor's report on the respondent's account, the respondent objected to the Auditor having taxed off all the items of expenses in connection with the adjustment of the stated case, amounting to £7, 7s. 2d.

The Court *sustained* the objections to the Auditor's report, but modified the amount of the expenses of adjustment at £2, 2s., *holding* that while the fair and reasonable expenses of preparing the case formed part of "the expenses of the stated case," certain of the charges made, and especially a fee to counsel for revising the case, were not reasonable.

M'Govern v. *Cooper & Company*, November 30, 1901, 4 F. 249, 39 S.L.R. 164, *distinguished.*

Mrs Agnes Scott or Brown having claimed compensation under the Workmen's Compensation Act 1897 on account of the death of her son Peter Brown, from the London and Edinburgh Shipping Company, Leith, the matter was referred to the arbitration of the Sheriff-Substitute (GUY) at Edinburgh, who made an award of £93, 12s.

At the request of the London and Edinburgh Shipping Company the Sheriff-Substitute stated a case for appeal.

The case set forth—"On 6th May 1904 the steamship 'Fingal,' owned by the appellants, was moored at the quay adjoining the West Pier, Leith. On that date her cargo was being discharged by workmen in the employment of Peter M'Leod, stevedore, Leith, who was under contract with the appellants to discharge the cargo at an overhead rate per ton. The discharge was being carried out at three holds of the vessel—namely, the forehold, mainhold, and afterhold—by means of steam cranes on board the vessel. Certain of Peter M'Leod's employees were engaged on board the vessel and certain of them on the quay, each man being appointed to work in or in connection with one of said holds. Peter Brown, who resided at 5 Citadel, Leith, was one of Peter M'Leod's employees engaged to work on the quay in connection with the discharge of the cargo from the afterhold. His duty was to remove the cargo, on its being put upon the quay, to the place appointed for it, and he did not require, in the performance of such duty, to go on board the vessel. In returning from the place where he had put part of the cargo, and while passing the forehold of the vessel, he was informed by another employee of Peter M'Leod, who was working on board the vessel in connection with

the forehold, that a man was lying unconscious in the forehold. This man was David Preston, also in the employment of Peter M'Leod, and engaged in the work of discharging the forehold. Peter Brown, on receiving this information, did not return to his work on the quay at the afterhold, but immediately went on board the vessel by the forehold gangway, offered to descend into the forehold, and was lowered by means of the crane there situated, for the purpose of rescuing Preston. Prior to his being so lowered a handkerchief was tied over his mouth, to prevent, if possible, his inhaling any noxious gas. In so acting, Brown did not wait to receive instructions from his employer, who was absent from the forehatch at the time he was lowered into the hold, though his said employer had learned of Preston's being unconscious, and had himself gone in search of rescue appliances. The crane was used for lowering the said Peter Brown without the knowledge of the said Peter M'Leod. On being lowered into the hold Brown also became unconscious, and before the two men could be rescued they died. Their death was occasioned by their inhaling carbonic acid gas that had been generated in the said forehold from a cargo of artificial manure. The period of Peter Brown's employment by the said Peter M'Leod was less than three years. His average weekly earnings during the period of his actual employment under Peter M'Leod were 25s. The respondent is his mother. He left no dependants wholly dependent upon his earnings at the time of his death, but the respondent was in part dependent upon him at the time of his death, being in receipt from him of the sum of 12s. per week.

"On 31st October 1904 I pronounced judgment, finding that Peter Brown's employment was on, in, or about a factory within the meaning of the Workmen's Compensation Act 1897; that the appellants were the undertakers within the meaning of said Act; and that said accident arose out of and in the course of the said Peter Brown's employment. I also found that the respondent was entitled under said Act to such sum as is reasonable and is proportionate to her injury, fixed the same at £93, 12s., and granted decree against the appellants for that sum, with expenses."

The questions of law for the opinion of the Court were—"(1) Whether the deceased's employment was on, in, or about a factory within the meaning of the Workmen's Compensation Act 1897; and (2) Whether on the facts proved the accident arose out of and in the course of the deceased's employment."

Argued for the appellants—The accident did not arise out of and in the course of the deceased's employment. His employment was on the quay, and when he went on board the ship his employment ceased and he was in precisely the same position as any passer-by who might have volunteered—*Smith* v. *Lancashire & Yorkshire Railway Co.*, [1899] 1 Q.B. 141; *Rees* v. *Thomas*, [1899] 1 Q.B. 1015. The fact that both deceased men were in the employment of the same master was immaterial, especially looking to the fact that they were employed in different places or factories, the one upon the quay the other in the vessel's hold. The action of the deceased was from a moral point of view most praiseworthy, but it was not one for the consequences of which an employer was liable under the Workmen's Compensation Act.

Argued for the respondent—The deceased met his death in the course of his employment and in or about a factory in the meaning of the Act. Both men were working in the same factory composed of the ship and the quay, and it was part of their employment to help each other if either got into danger. The deceased acted in his master's interest and as his master would have wished him to act in the sudden emergency. To succeed the appellants would have to show that the deceased's action was improper and amounted to serious and wilful misconduct—*Rees* v. *Thomas*, *supra*; *Menzies* v. *M'Quibban*, March 13, 1900, 2 F. 732, 37 S.L.R. 526; *Lynch* v. *Baird & Co.*, January 16, 1904, 41 S.L.R. 214; *Goodlet* v. *Caledonian Railway Co.*, July 10, 1902, 4 F. 986, 39 S.L.R. 759; *Durham* v. *Brown Brothers & Co., Limited*, December 13, 1898, 1 F. 279, 36 S.L.R. 190.

LORD JUSTICE-CLERK—It appears to me that there can be no doubt that the deceased workman was at the time when working immediately before the accident employed on, in, or about a factory, the work which was being done having been the unloading of a ship and the placing of her cargo upon the quay alongside. Therefore the only real question in the case is whether it can be held that he was in the course of his employment at the time when the accident to him occurred which caused his death. The circumstances are, that while at the side of the vessel he was suddenly informed that a fellow workman was unconscious in the forehold, that he at once tied a handkerchief over his mouth and got himself lowered to try to rescue the other man, and was himself suffocated.

Is he to be held in these circumstances to have acted in his employment? I think it must be fairly held that that question may be answered as it was answered in the Court below. I cannot doubt that in a sudden emergency where there is danger a workman does not go out of his employment if he endeavours to prevent its taking effect. For example, if in a yard where a man is working, a horse suddenly runs off and there is danger to others, I would hold that if the man did his best to stop the horse and met with an injury, he suffered that injury in the course of his employment. It was a right thing to do in the interests of the safety of those in the yard, and therefore in the interests of his master. The same would apply to the endeavour to sprag a runaway waggon which might cause loss of life. No doubt this case is somewhat unusual, and the endeavour was made to liken it to the case of persons arriving on the scene of a disaster, such as a coal-pit explosion, and deliberately volunteering to

join a rescue party, and who therefore could be held not to be acting as employees but solely as individuals. I can conceive such a case where it would be very difficult to make the Act apply, but in my view any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him engaged in work on the quay come suddenly into danger, and he had instantly endeavoured to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory. My opinion is that there is no sufficient ground disclosed in the statement of facts to require that we should hold that the Sheriff pronounced a wrong decision in law in finding liability under the Act, and that the questions in the case should be answered in the affirmative.

LORD YOUNG—I concur.

LORD KYLLACHY—In this case I should have been glad to have seen my way to concur in the Sheriff's judgment. For undoubtedly the unfortunate deceased sacrificed his life in performing a most meritorious action. But the question is whether his relatives are entitled to compensation under the Workmen's Compensation Act 1897, and I have come to the conclusion that, putting on the provisions of that Act the most liberal interpretation possible, the case with which we have to deal is not a case to which they apply.

It is admitted—at least it is clear—that there are three conditions which must be satisfied before the Act can apply—(1) the occurrence which has caused the death or injury must have been in the sense of the Act an "accident"; (2) the accident must have arisen out of the workman's employment—that is to say, his employment with the defending employer; and (3) it must also have been an accident arising in the course of that employment. All these things, I apprehend, must be affirmed before the Act can apply.

Now I do not find it necessary to determine whether in the present case the two latter conditions are satisfied. I confess I have some doubt whether the occurrence happened in the course of the deceased's employment. And I also doubt whether it can be said to have arisen out of his employment—I mean out of his employment at the particular time and place. I rather think that upon the facts stated it is difficult to affirm that what happened would not equally have happened although the deceased being at the time where he was he had been there in some other employment or in no employment at all.

But assuming both of these points in the respondent's favour, the question (I think the initial question) still remains, viz., whether the deceased lost his life by what can properly be called "accident." The statute, according to its title, applies only to "accidental injuries"; and compensation is allowed not in respect of *all injuries* arising out of or in the course of the workman's employment, but only in respect of personal injury *by accident*. That being so, and the statute containing no definition of the term "accident," that term must, I apprehend, be taken in its ordinary and usual sense—the sense in which it is employed in common speech. What has to be affirmed therefore is that, in the ordinary sense of the expression, the death of the deceased was a death *by accident*.

Now, it is, of course, not enough that the deceased met his death in seeking to redress the results of an accident. The unfortunate man whom he sought to rescue may have been a victim of accident; that does not appear, but it probably was so. But the presence, accidental or otherwise, of poisonous fumes in the hold of this vessel was of course in no proper sense the cause of the deceased's death. The cause of his death was his descending into the hold and coming in contact with those fumes. Accordingly, the question I apprehend is, whether he came in contact with the fumes by accident in the sense of the statute.

Now, when the question is so stated it seems to me to be difficult to return an affirmative answer. For how did the deceased come into contact with the poisonous fumes by which he perished? It is, I am afraid, clear that he did not do so acting instinctively upon some sudden and instinctive impulse—some impulse so sudden and instinctive as to be perhaps in itself an accident. Nor again, was what occurred the result of something casual and adventitious—such, for example, as tripping or stumbling or losing his hold, and so falling into the hold. On the contrary, what happened was this. He (the deceased) voluntarily and deliberately, knowing and having in view that he was going out to encounter a serious and perhaps deadly danger, left the place of his work, boarded the ship, offered to descend into the hold, had himself lowered into it by the crane, and so purposely and deliberately put himself into contact with the poisonous fumes, by the direct action of which he died.

I confess I do not see how such an occurrence can be an accident under the statute, unless, indeed, it is to be held that in the sense of the statute the term "accident" includes everything that is not the result of gross and wilful misconduct on the part of the workman. That was not suggested in argument, and for myself I am not prepared to put so extreme a construction upon the statute. It is not necessary, and I do not propose to attempt any formal definition of the term "accident," a term which the statute does not define, but leaves, as I have said, to be interpreted according to its use in common speech. But I think, speaking generally, we know fairly well the kind of occurrence which the expression denotes, and all I can say is that it does not seem to me to denote or cover such occurrences as we have here to consider. It appears, I confess, to me that to describe the death of this brave man as a death by accident would be a misnomer, as much a mis-

nomer as if the expression were applied, say, to the death of the leader of a forlorn hope, or of a soldier who, taking his life in his hand, crosses a zone of fire to rescue a wounded comrade; or of a servant who, to save say his master, makes his way through smoke and flame into a burning house; or of a miner who forms one of a rescue party, who (volunteers being called for) descend into a fiery mine and succumb to the peril which they have bravely faced. Such enterprises may be heroic, and deserve, and I hope generally receive, recognition. But for myself I doubt whether persons who engage in such enterprises would be flattered by the suggestion that (if employees in the position of this deceased) the appropriate recognition of their heroism was compensation by their employer as for an accident—compensation as for an accident arising out of or in the course of their employment.

On the whole, therefore, I am of opinion that while the first question in the case may be answered in the affirmative, the second question falls to be answered in the negative; and in any case that the appeal should be sustained and the defenders assoilzied.

The Court pronounced this interlocutor:—

"Answer the two questions of law therein stated in the affirmative: Find and declare accordingly: Therefore affirm the award of the arbitrator and decern: Find the respondent entitled to the expenses of the stated case, and remit the account thereof to the Auditor to tax and to report."

The Auditor having lodged his report, the respondent objected thereto, in so far as he had disallowed a number of charges amounting in all to £7, 7s. 2d., incurred in connection with the adjustment of the stated case. The sum of £7, 7s. 2d. was made up of twenty-five different items, including charges for perusing and considering minute, attendance, obtaining case at Sheriff Clerk's, perusing case, correspondence, and meetings with appellants' agents, a fee of £2, 7s. to counsel and clerk for revising case, charges for instructing counsel, &c.

The Auditor allowed a fee of £1, for "taking instructions to defend Sheriff-Substitute's interlocutor."

Argued for the respondent—From the terms of the Workmen's Compensation Act 1897, Schedule II, 14 c, and the Act of Sederunt of 3rd June 1898, section 9, it was evidently contemplated that expenses must be incurred in adjusting the case. The charges made here were all legitimate, and came under "expenses of the stated case" allowed by the interlocutor of 31st January. In a case such as the present where the adjustment was a matter of difficulty a fee to counsel was reasonable. The case of *M'Govern* v. *Cooper & Company*, November 30, 1901, 4 F. 249, 39 S.L.R. 164, did not govern the present case and was distinguishable. There the respondent was allowed the "expenses of the appeal"; the "appeal" only began after the action came into the Court of Session.

Argued for appellants—The case was ruled by *M'Govern*. Any expenses prior to the first enrolment were covered by the charge which had been allowed for "taking instructions to defend Sheriff-Substitute's interlocutor."

LORD JUSTICE-CLERK—I do think that the present case is governed by *M'Govern* v. *Cooper & Company*, November 30, 1901, 4 F. 249. The interlocutors in the two cases are different. In the case of *M'Govern* the respondents were found entitled to "the expenses of the appeal," in the present case the respondent is found entitled to "the expenses of the stated case." The two expressions are different, and I do not regard the cases as being in *pari casu*. Here, where the respondent has been allowed the expenses of the stated case, I consider that the Auditor has erred in holding that all the expenses connected with the preparation of the case prior to its actual presentation to the Court are excluded. I am of opinion that the fair and reasonable expenses of preparing the case are included in the interlocutor, and should have been allowed.

Many, however, of the items set forth in the respondent's account cannot be included in that category, and are not charges which a successful party is entitled to call upon the unsuccessful party to bear. Here we have, without going into the matter in detail, charges for a list of preliminary letters connected with the adjustment of the case, a charge for instructing counsel to revise the case, a fee to counsel and clerk for revising the case, a charge for attendance on counsel in connection with the revision and adjustment, and so on. One of the objects of the Act is to avoid the multiplication of expenses in so far as that is possible, and the class of expenses I have indicated above is one which, if incurred at all, must be borne by the party who incurs it. As regards especially the fees and charges connected with the employment of counsel, I am at a loss to see what counsel can adjust. The facts of the case can only be adjusted by those who were present at the arbitration, and who knew what took place. The Act of Sederunt, which provides for the method of adjusting the stated case, imposes the duty of its preparation upon the sheriff-clerk, who must submit it in draft to the parties and their agents, and if they cannot agree as to its terms the Sheriff himself adjusts it. As regards the questions of law, although in practice they may be arranged by the parties, they are really questions propounded by the Sheriff, and are entirely outwith the province of counsel. I am quite clear that all charges connected with the employment of counsel in connection with the preparation of the case are illegitimate. As I have already indicated, I think the same remark applies to certain other charges. The total charges connected with the preparation of the case apparently come to approximately the sum of £7. I think it would be undesirable to remit them to the Auditor for taxation, as

that would involve still further cost, and accordingly I propose that we should modify them at two guineas.

LORD ADAM—I understand that the interlocutor in this case finds the pursuer entitled to "the expenses of the stated case." I also understand that the Auditor has not considered the particular items in question separately, but has struck out all the charges connected with the preparation of the stated case. I agree with your Lordship that there are certain expenses incurred in preparing the stated case which are necessary and legitimate, such as the cost of the application to the Sheriff to state a case, and the adjustment of the draft. I also agree that, so far as these necessary expenses are concerned, the successful party is entitled, under such an award as the present, to recover them from his opponent. I do not think that this case is ruled by *M'Govern* v. *Cooper & Co.* In that case the respondent was found entitled to the expenses, not of the "stated case," but of "the appeal," and this included only the expense of the proceedings after the action had been brought into the Court of Session, and not expenses incurred prior to that date. Then it is said that the charges in question are covered by the fee which has been allowed for taking instructions, and which is included in the account of expenses in the Court of Session. I do not think that this is meant to cover the expenses of the proceedings in the Sheriff Court connected with the preparation of the case. As regards the particular items in this account, they have not been, as I have said, separately considered by the Auditor, and I think that the amount charged is too large. I agree that in this case the amount should be modified to two guineas.

LORD KYLLACHY concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the Auditor's report on the respondent's account of expenses and note of objections thereto for the respondent, Sustain the objections by adding the sum of £2, 2s. to the amount of £27, 14s. 6d. allowed by the Auditor: *Quoad ultra* approve of the Auditor's report, and decern against the appellants for payment to the respondent of the sum of £29, 16s. 6d. of expenses: Further, find the respondent entitled to the expenses of the discussion, which modify at the sum of £2, 2s., for which also decern."

Counsel for the Appellants—Salvesen, K.C.—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Respondent—Younger—W. T. Watson. Agents—Beveridge, Sutherland & Smith, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GRIFFITH'S JUDICIAL FACTOR *v.* BRATHWAITE.

Succession — Testament — Foreign — Testament Executed in Foreign Country — Words Habile to Dispose of Heritage in Scotland—"Effects."

A testament, executed in British Guiana by a person resident there who was proprietor of heritage in Scotland, disposed of the testator's "effects in and out of the colony." *Held* (1) that the testament, being in ordinary language and containing no technical words, fell to be construed without the necessity for inquiry as to its construction by the law of British Guiana; and (2) that the terms of the testament were not effectual to convey the heritable property in Scotland belonging to the testator.

William Martin Griffith, a native of British Guiana, died upon 9th July 1903, leaving a will executed in British Guiana, and dated 11th August 1891. The will was in the following terms:—

"Last Will and Testament—Colony of British Guiana.

"In the name of God. Amen.—Be it known that I, William Martin Griffith, residing in the city of Georgetown, county of Demerara, and Colony above named, being about to leave the Colony, and in order to prevent any doubts or disputes arising after my demise as to the disposition of my effects in and out of the Colony, do make, publish, and declare this to be my last will and testament, hereby expressly revoking all former wills and codicils, and I now order as follows, viz.—

"*Firstly.* I request that all my funeral expenses and just and lawful debts be paid as soon after my demise as possible.

"*Secondly.* I will and bequeath to my brother John Henry Brathwaite, my sister Mary Rose Beete (born Lynch), and my unborn babe (mother Blanche Ezepha Chapman), all my effects, to be divided equally between the three as soon as possible after my demise.

"In the event of the first (my brother) dying, his portion must go to his present wife and her heirs.

"In the event of the second (my sister) dying, her portion must go to her children; and in the event of my unborn babe dying, its portion must go to its mother, above named.

"*Thirdly.* I nominate, constitute, and appoint John Henry Brathwaite and M'Lean Ogle as executors, with power of assumption, substitution, and surrogation."

Griffith, who was illegitimate, came to Scotland in 1891, and spent the last years of his life in Scotland. He was possessed of heritable property in Glasgow valued at £2000.