substituting issue for a parent, was simply to give expression by the testator to what would otherwise have been an implication of law under the *conditio si sine liberis decesserit*, for the issue could only take what had already vested in the parent.

LORD LOW—I agree. It is to be observed that the only gift which is given to the nephews and nieces is contained in the direction to the trustees at the death of the liferentrix to realise the subjects liferented, and divide the proceeds thereof among her nephews and nieces. That being so, I think it is plain that the survivorship clause applies to the period of division and payment and to no other. Now the only difficulty arises from the fact that the survivorship clause is expressed in this way—"Failing any of them without issue, to the survivors or survivor of them.' The expression "without issue" can be construed either as "without ever having had issue" or "without leaving issue." Which of these two constructions is to be adopted depends on the context. It seems to me that here it means "without leaving issue," the time to which the words apply being the termination of the liferent and the period of division. If at that period a nephew or a niece has died without leaving any child then alive to represent him or her, his or her share passes to the survivors. Accordingly, Elizabeth and her child having both predeceased the liferentrix, nothing vested in either of them.

LORD ARDWALL — I am of the same opinion. In the sixth purpose of the trust-disposition and deed of settlement of Mrs Duff there is no gift of the fee of the property at Blackness Terrace or the proceeds thereof till after the death of the liferentrix Miss Mary Garland, because the only words of gift are contained in a direction to the trustees after that event to sell and dispose of the said property, and to divide the free proceeds thereof among certain named beneficiaries. Accordingly until after the death of the liferentrix there was no gift made, and indeed there was no fund to divide, and therefore in my opinion it cannot be held that there was any vesting of the shares of that fund in any of the beneficiaries—see *Bryson's Trustees* v. *Clarke*, 8 R. 142. I think it is equally clear that the survivorship clause refers to the same period, namely, the death of the liferentrix—see *Young* v. *Robertson*, 4 Macq. 318. Now the survivorship clause comes to this, that the share of any of the nephews or nieces who predecease the liferentrix is to accresce to the survivors and the only event in which accretion is not to take place is the event of any nephew or niece leaving issue alive who should survive to take the share of the parent. Mrs Leighton had a child, but that child died before the liferentrix, and therefore no share fell to either mother or child; and the whole proceeds of the said subjects now fall to be divided in terms of the directions of the deed among the nephews and nieces of the truster who survived the liferentrix.

The Court answered the first alternative of the question of law in the negative, and the second in the affirmative.

Counsel for the First, Second, Fourth, Fifth, and Sixth Parties—Ingram. Agents—Galloway, Davidson, & Mann, S.S.C.

Counsel for the Third Party—D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, January 23.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MALONE *v.* CAYZER, IRVINE, & COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule* 1, *sec.* 1—*Death Resulting from Injury—Suicide—Averments that Accident to Eye Brought about Insanity Resulting in Suicide—Relevancy.*

A workman who had lost the sight of his left eye met with an accident involving the loss of sight of his remaining eye. He thereafter became insane and committed suicide. In an arbitration under the Workmen's Compensation Act 1897 at the instance of his widow against his former employers the pursuer averred—"In consequence of the said injury the said J. M. received a severe shock and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness the said J. M.'s mind became affected and he became insane and . . . committed suicide. . . . The death of the said J. M. was due to the foresaid accident. . . ."

Held that there must be a proof.

Per the Lord President—The claimant "will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury."

Statement of law by Collins (M.R.) in *Dunham* v. *Clare*, [1902] 2 K.B. 292, *approved.*

The Workmen's Compensation Act 1897, (60 and 61 Vict. c. 37), Schedule 1, sec. 1, enacts — "The amount of compensation under this Act shall be—(*a*) When death results from the injury. . . ."

In an arbitration under the Workmen's Compensation Act 1897 between Mrs Mary Ann Mullen or Malone, 401 Rutherglen Road, Glasgow, pursuer, and Cayzer, Irvine, & Company, shipowners, 109 Hope Street, Glasgow, defenders, the pursuer claimed compensation for the death of her hus-

band. The Sheriff-Substitute (DAVIDSON) sustained a plea that the application was irrelevant, and dismissed it. An appeal was taken.

The stated case set forth that the appellant made, *inter alia*, the following averments—". . . (2) On or about 25th May 1907, and for some months prior thereto, the said deceased John Malone was in the employment of the respondents at their repairing shop in Finnieston Street as a hammerman. Said repairing shop is a factory within the meaning of the Workmen's Compensation Act 1897.

"(3) On said date, about 7·30 A.M., the said deceased John Malone was engaged in the course of his employment in said repairing shop cutting an iron ladder. Another of respondents' workmen was holding a chisel against said ladder and the deceased was striking the chisel with his hammer when a piece of said iron ladder flew off, penetrating his right eye.

"(4) The said deceased John Malone was taken to the Eye Infirmary, where his eye was treated and he was then sent home. About twenty years before the date of said accident the said deceased John Malone had met with an accident which caused him to lose the sight of his left eye, and when he was injured on 25th May 1907 the sight of his right eye immediately began to fail, and became gradually worse until he was rendered almost blind.

"(5) In consequence of the said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye and consequent blindness, the said John Malone's mind became affected and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road.

"(6) The death of the said John Malone was due to the foresaid accident, which arose out of and in the course of his employment with the respondents in their said factory at Finnieston Street."

The question of law was—"Whether, in the circumstances set forth in the case, the application was rightly dismissed?"

Argued for appellant—The appellant was entitled to prove her averments that her husband's insanity and consequent death were due to the accident. The deceased's insanity was brought on by loss of sight. Such a form of insanity was recognised by medical science and by the leading alienists (*e.g.*, Clouston). The question at issue was whether the suicide was a natural result of the injury, apart from whether it was a probable consequence of it or not. That was a pure question of fact, of which the appellant was entitled to a proof—*Dunham* v. *Clare*, [1902] 2 K.B. 292, *per* Collins (M.R.), p. 296. Reference was also made to *Golder* v. *Caledonian Railway Company*, November 14, 1902, 5 F. 123, 40 S.L.R. 89.

Argued for respondents—The decree of the Sheriff was right. Malone's death was due to his own act. His suicide could not be regarded as the natural consequence or even as the probable result of the accident. It was not directly traceable to the injury, and if it were so traceable there was, in the words of Collins (M.R.) a new act giving a fresh origin to the after consequences — *Dunham*, *cit. supra*. The damages were too remote to justify inquiry. Suicide was not an "accident" in the sense of the Workmen's Compensation Act—*Hensey* v. *White*, [1900] 1 Q.B. 481 (opinion of Collins, L.J.). The primary and actual cause of Malone's death was the diseased condition of his brain. In any event that was a *novus actus interveniens*. Reference was made by way of contrast to *Lloyd* v. *Sugg & Company*, [1900] 1 Q.B. 486.

At advising—

LORD PRESIDENT—The facts which give rise to the controversy here are certainly somewhat out of the common. It is an arbitration under the Workmen's Compensation Act, the claimant in it being the widow of a workman called Malone, who was in the employment of the respondents Cayzer, Irvine, & Company. The averments of the claimant and appellant set forth that while Malone was at his work in May a splinter of iron flew into his right eye. That of course was an ordinary accident in the course of his employment, which, had he survived, would have entitled him to make a claim for compensation in the ordinary way. It seems that he had many years before lost the sight of his other eye, and the injury was such that the sight of his remaining eye, according to the averments, immediately began to fail, and became gradually worse until he was rendered almost blind. Then, continues the claimant—I now read textually—"In consequence of said injury the said John Malone received a severe shock, and his nervous system completely broke down. Owing to the gradual loss of sight in his right eye, and consequent blindness, the said John Malone's mind became affected, and he became insane, and on 20th August 1907 he committed suicide in his house at 401 Rutherglen Road. The death of the said John Malone was due to the foresaid accident, which arose out of and in course of his employment with the respondents."

Now, upon that statement of the facts, the learned Sheriff-Substitute before whom the case came as arbiter dismissed the application as irrelevant. The claimant has appealed to your Lordships, and the motion before us is to send the case back to the Sheriff and tell him to allow a proof of those averments which I have read. Of course there can be no question, I take it, as to the accident having actually happened—that is to say, the splinter going into his eye, but what happened afterwards is evidently matter upon which there may be controversy.

The expression in the statute is that the death must be the result of the injury, and really the views which I hold have been so extremely well expressed by Lord Collins when he was Master of the Rolls that I prefer to take what he has said rather than try to re-express them myself. The passage

which I am going to cite is taken from the case of *Dunham* v. *Clare*, L.R., [1902] 2 K.B. 292. The state of the facts in that case was that a man was carrying some heavy pipes, one of which slipped and fell on his foot, inflicting a wound in his toe. He was put into an hospital, and a disease called phlegmonous erysipelas supervened. The evidence was that erysipelas of this description was a very unusual consequence of a wound of the kind, and that, according to the theory which at present obtains, was caused by the introduction somewhere or other of a germ. Lord Collins says this—"The applicant for compensation therefore has to show an accident causing injury, and death or incapacity resulting from the injury. In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after-consequences. In dealing with an obligation created by the Act we are not dealing with a case of contract or tort or with a liability of a criminal nature. In the case of contract, a person who commits a breach of it is liable for the consequences which naturally follow from the breach. So, too, in cases of tort, when the question arises whether a person is liable in respect of a breach of some duty imposed upon him, he probably, and in some cases certainly, comes under a somewhat larger liability than would be the case if it were a breach of contract, but still the liability is measured by what are the reasonable and probable consequences of his breach of duty. That lets in the consideration of reasonableness. No question of reasonableness comes into the present discussion. The Act has imposed the liability irrespective of any error of judgment or negligence on the part of the employer. The only question to be considered is, Did the death or incapacity in fact result from the injury?" That exactly expresses my opinion, and if that is so I think that the Sheriff-Substitute was too quick here in dismissing this case as irrelevant upon the face of it.

I do not think I ought to say much more, except to explain that I am very far from saying that upon the face of this pleading there is evidently made out a case, because the question is whether causation is or is not made out, and it may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising from such an injury in such a way—she must show that it was in fact the result of the injury. I have some doubts as to whether the state of knowledge of cerebral pathology is so fixed as, in circumstances like this, to enable one to reach such a conclusion, but I do not think we could try the matter from our own ideas on such subjects. Therefore I am of opinion that we should remit the case to the Sheriff-Substitute, and order him to allow an inquiry into the matters averred.

LORD M'LAREN—If we were to criticise the statements of facts in this case with the same strictness which we do in questions of relevancy in actions in this Court, there is a great deal I think to be said against the relevancy of the averments, because I cannot gather from the Sheriff-Substitute's statement anything more than this, that the man committed suicide in consequence of the depression of mind brought on by his blindness. There is no averment of insanity in the physiological sense of a result of disease of the brain, but merely that a man has committed suicide, and is supposed to have done so under some insane impulse. It seems to me that in construing the Act of Parliament, and particularly the beginning of the First Schedule, we must hold that when the Act prescribes as a condition of compensation that death results from the injury, what is within the contemplation of the statute is a material injury with death materially resulting from it. To explain what I mean regarding insanity—if a person, being a workman, were to receive a blow or a wound on the head which set up inflammation of the brain, and a medical expert came to the conclusion that the injury to the brain was the result of the blow on the head, and if the injury went on and left the man in an insane condition, from which eventually he died, then I should not for a moment doubt that the man's death was the result of the accident. But, on the other hand, it is easy to figure cases of death resulting only from the moral effect of an accident. If, for example, a man in consequence of the loss of his sight took to drinking and shortened his life by intemperance, that would be a very clear case for not giving compensation, because although in a sense death was the result of the injury, it was not a material but a moral result. Now, in this case I am not disposed, any more than your Lordship, to construe the statement of the Sheriff-Substitute, which is merely an echo of the averments of the party, with great strictness. I think there ought to be a proof, and as the parties might wish to bring the case before us again, I hope the Sheriff-Substitute will direct his attention to the point whether this is insanity that would be proved by medical evidence of the symptoms, or whether it is anything more than just a mode of stating the supposed cause, because there must be some cause for the suicide. I agree that it is desirable to have the facts brought before us, and I notice that in the case of *Dunham*, [1902] 2 K.B. 292, which your Lordship cited, there had been an inquiry, and the judgment of the Court proceeded upon a statement of the facts proved in the case.

LORD KINNEAR—The question whether

death has resulted from an accident is always a question of fact. Therefore I think it is indispensable that the arbitrator should have the facts ascertained before he decides it. I therefore agree that the case should go back to the learned Sheriff in order that the petitioner may have an opportunity of proving her case if she can. That being so, I think the less one says about the *prima facie* aspect of the statement of the facts probably the better, but one cannot help seeing that there may be a difficulty in connecting the accident with the alleged result by an unbroken chain of connection. The exact point where the difficulty may arise I do not know, but speaking for myself I do not think I have sufficient knowledge of the pathology of insanity to form even a provisional opinion. Therefore I think it better to say that I agree with your Lordships that the facts must be ascertained.

LORD PEARSON was absent.

The Court answered the question in the case in the negative, recalled the determination of the arbiter, and remitted to the Sheriff-Substitute as arbiter to allow parties a proof of their averments.

Counsel for the Pursuer (Appellant)—Morison, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents) Hunter, K.C.—R. S. Horne. Agents—Anderson & Chisholm, Solicitors.

Friday, January 24.

SECOND DIVISION.

[Sheriff Court at Glasgow.

AITKEN, CAMPBELL, AND COMPANY LIMITED *v.* BOULLEN & GATENBY.

Sale—Sale by Sample—Disconformity to Contract—Right of Partial Rejection—"Different Description not Included in the Contract"—Attempted Partial Rejection where Disconformity in Quality, not in Kind—Effect of Invalid Rejection as a Bar to Retention—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 30 (3).

A firm bought 133 pieces of maroon twills by sample and paid for them. Subsequently on making a full examination they found that 64 pieces were not conform to contract in respect that they were "softer" than the sample. The buyers intimated their acceptance of the balance of the goods and their rejection of the 64 pieces, and returned the latter to the sellers, who refused to accept re-delivery. The buyers then raised an action against the sellers for repayment of the price paid for the defective pieces, maintaining that they were entitled "to accept the goods which are in accordance with the contract and reject the rest" as being of a "different description," *i.e.*, what was known to the trade as "tender goods," and fit only for sale by weight. Alternatively on the footing of retaining the whole goods they sued for damages.

Held (1) that though some of the goods were deficient in quality, yet as all were of the kind contracted for, *i.e.*, maroon twills, and were delivered under one contract of sale, the Sale of Goods Act 1893, sec. 30 (3), did not apply, and the attempted partial rejection was invalid; and (2) that as the defenders had not been prejudiced by the attempted rejection, the pursuers were not barred from now retaining the goods and claiming damages.

The Electric Construction Company, Limited v. *Hurry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295, and *Croom & Arthur* v. *Stewart & Company*, March 14, 1905, 7 F. 563, 42 S.L.R. 437, *distinguished* and *commented on*.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 11 (2)—"In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages." Section 30 (3)—"Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

Aitken, Campbell, & Company, Limited, warehousemen, Glassford Street, Glasgow, raised an action in the Sheriff Court at Glasgow against Boullen & Gatenby, manufacturers, St James Street, Manchester, who were admittedly subject to the jurisdiction of the Court *ex reconventione*, and from whom they had purchased goods, for payment of £50, 19s., or alternatively the sum of £25, 16s. The sum first sued for was made up of (1) £39, 19s. 4d., which was the price paid by the pursuers for that portion of the goods which, as after mentioned, they had attempted to reject, and (2) £10, 19s. 8d., being the loss and damage alleged to be sustained by them owing to the defenders' breach of contract. The sum alternatively sued for, £25, 16s., represented the loss and damage alleged to be sustained by the pursuers on the footing of their retaining the whole goods.

The pursuers pleaded—"(1) The defenders, having broken their contract with the pursuers, are liable in payment to the pursuers of the loss and damage thereby caused. (2) The pursuers having rejected a portion of the goods and having overpaid the defenders, incurred loss and expenses, and made disbursements to the extent of the sum sued for through the failure of the defenders to implement their contract, are entitled to decree for payment thereof. (3)