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

manager found it 52½ degs. at the mid-landing, where Brown and his fellow-miners had been kept waiting, 53½ degs. at Brown's working-place, and 61 degs. at No. 2 Pit bottom. There is no evidence as to the temperature at these places on 26th June 1911. 7. At this mid-landing of No. 1 shaft on 26th June 1911 a very strong current of air blew in on Brown and his fellow-miners who were waiting there to be raised. They had been sweating at their work (though their clothes were not wet from any other cause) and felt the down draught very cold and complained of it at the time. After the men reached the surface Brown complained of feeling cold, his teeth were chittering, he complained of his feet being cold, and ran part of the road home to try to recover warmth. He remarked to a fellow-workman who accompanied him, 'I doubt I'm sent for.' 8. The next morning Brown went down the pit, but he was unable to start work on account of illness, due to the chill incurred on the previous day. He returned home and went to bed, pneumonia supervened, and he died therefrom on 3rd July 1911, having been removed on that day to the Royal Infirmary, Glasgow. 9. The deceased left a widow and four pupil children, and a posthumous child has been born of the marriage. 10. Brown's average weekly earnings prior to the accident were £1, 8s. 8d. In these circumstances I found that the deceased John Brown died from the effects of injuries by accident received by him on said 26th June while in the course of his employment with the appellants, and awarded compensation to the respondents."

The *question of law* was—"Whether there was evidence upon which it could be competently found that the said John Brown sustained an accident arising out of and in the course of his employment on 26th June 1911?"

Argued for the appellants—There was here no accident. The case was distinguishable from the cases of *Kelly* v. *Auchenlea Coal Company, Limited*, 1911 S.C. 864, 48 S.L.R. 768, and *Alloa Coal Company, Limited* v. *Drylie*, January 25, 1913, *supra*, p. 350, in respect that there was no external unforeseen event which could be predicated as the cause of the chill. On the contrary, the condition of the place where the chill was contracted was normal.

Argued for the respondent—The present case was ruled by the decision in *Alloa Coal Company, Limited* v. *Drylie* (*cit. sup.*), and the circumstances in the two cases were similar. The cold air in the present case was in the same position as the cold water in the other. In both cases the ultimate cause was a breakdown in the pit, and this constituted an abnormal occurrence. [LORD DUNDAS referred to *M'Millan* v. *Singer Sewing Machine Company, Ltd.*, December 7, 1912, 50 S.L.R. 220.] That case was distinguishable from the present, because there was no abnormal occurrence there, as there was in the present case.

LORD JUSTICE-CLERK—The case which has been referred to by counsel—the case of *Drylie*—is certainly the nearest to the one that is before us that can be referred to. But I think it is very clear that there is a marked distinction between that case and the present. In both cases, undoubtedly, something abnormal happened in the pit. In the one case what happened was that a pump broke down, and in the other case what happened was that a shaft got out of order. Now in *Drylie*, as a consequence of the accident in the pit, a state of things was produced which was quite out of the ordinary working of the pit. There occurred an alarming accumulation of water, and that accumulation was obviously an abnormal thing, for although the pit was a wet one, that does not mean that water was allowed generally to accumulate so as to be dangerous. The accumulation of water caused alarm and induced the men who were working to quit the work and to go to the bottom of the pit, to be ready as soon as they could get into the cage to ascend to the surface, and while they were there the water, which was icy cold, rose upon them up to their knees.

That state of matters is quite different from the state of matters in the present case except in one particular element, namely, that in both cases the men whose claims were before us had to stand in the pit for some time. But what appears to me to make the cases absolutely different is this, that in the one case the men were exposed to something which was entirely different from anything that they ever had to encounter in the pit before, whereas in this case there was nothing of that kind at all. There was no abnormality as regards the place at which they had to stand. The ventilation was working just as it usually worked, the air was coming down that shaft just as it usually came down, and there was nothing as regards the place where this man was standing which could be called an accident from any point of view.

Is it to be said in these circumstances that the respondent has suffered from an accident because he caught a cold which ultimately developed into pneumonia, resulting in his death? I am quite unable to perceive how that can be held. It seems to me that the case is absolutely distinguished from that of *Drylie*, and therefore that the judgment of the arbitrator in this case was erroneous, and we ought to answer the question accordingly.

LORD DUNDAS—I agree. The question really comes to be, whether or not this case is ruled by the case of *Drylie*, which was decided last Saturday by a fuller Bench than this. I have formed, with your Lordship, a clear opinion that the case is materially different from that of *Drylie*. *Drylie's* case was regarded by all the Judges as one lying very near the line of demarcation between liability and non-liability, but the majority of the Court refused to interfere with the arbiter's decision, which put the case on the side inferring liability. The present case is, I think, plainly on the other side of the line.

It was laid down quite clearly in *Drylie*, as it had been in previous cases, that if an applicant is to succeed he must show, to start with, a definite accident of some sort —an occurrence involving something unusual, unexpected, and undesigned, with which the illness or death can be definitely connected. In *Drylie* the majority of the Court thought that there was such an occurrence, namely, an unusual accumulation of ice-cold water at the pit-bottom, in which, as an incident of his employment, the unfortunate Drylie found himself immersed up to his knees, with the result that pneumonia and death followed. With regard to some observations made at the bar during the argument in this case I should like to say that I did not consider that the breakdown of the pump in *Drylie's* case, though it was a historical fact explanatory of the unusual accumulation of water, was an essential point in the case. The accumulation of water might have arisen from some other cause. I find in the present case no proper analogue of any such occurrence. I cannot find here any accident. It looks to me very like the case of a man who, having got into a sweat in the course of his ordinary work—no uncommon occurrence—catches a cold, which unfortunately developes into pneumonia and he dies. At the most it can be said that there was a wreck in one of the shafts—a fact, as it seems to me, of no particular importance in itself, and bearing no relation of physical causation to any injury the man sustained—that the men were ordered to leave the pit, and to leave it instead of as usual by the upcast shaft No. 2, by the downcast shaft No. 1, that they had to wait at the mid-landing while the men from the lower seam, who usually ascended by this shaft, were lifted up, and that Brown unfortunately caught a chill, which resulted disastrously. In all this I cannot see any accident within the meaning of the statute or the cases. The mere fact that the men were ordered to make their exit by one shaft instead of another will not do, and the surrounding facts, as your Lordship has pointed out, were normal, and not abnormal, so far as one can see. I think we must keep in view two things—first, that it is not every deviation from the normal routine of employment in a mine or elsewhere that will be sufficient to introduce the element of accident; and second, that an ordinary disease like pneumonia is not an accident, although it may arise from or be contracted by an accident. If one is to refer to cases, although I am not sure there is here much advantage in doing so, I should say that this case bears more resemblance to that of *Macmillan*, 1912, 50 S.L.R. 220, than it does to *Drylie*. I confess the only hesitation I have felt about this matter is that one is differing from the conclusion of so experienced and able an arbiter as Sheriff Shennan, but I am satisfied that his conclusion was not warranted by the facts found. Therefore, with your Lordship, I am for answering the question in the negative.

LORD SALVESEN—I am glad your Lordships have been able to reach the result which has just been expressed, because it indicates that the consequences of the decision of *Drylie's* case, are not so far reaching as I apprehended. At the same time I cannot see the distinction between this case and *Drylie's* so clearly as your Lordships. Indeed I think there is a very close resemblance between the facts of the two cases.

In each case there was a breakdown of some machinery in the mine. In each case as the result of that breakdown the men required to leave the pit, and it makes no difference that in the one case they reached the pit-bottom of their own accord, and that in the other the foreman, for the safety of the men, ordered them all out of the pit. In each case they were incidentally exposed to circumstances that were likely to produce chill, and in each case one man suffered from chill, which afterwards developed into pneumonia, from which he died. I quite appreciate the distinction that your Lordships have drawn—that the medium in which the man in this case was immersed was a current of air, and in that of *Drylie* gradually rising water. But in reality what caused the man's death was in each case accidental exposure to cold. Indeed in some respects *Drylie's* case is not so strong as the present, because I think a man is more likely to catch pneumonia from being detained for an hour and a half in a cold current of air than from standing twenty minutes even in what is described as ice-cold water up to the knees.

But I need scarcely say that there being, as your Lordships rule, a clear distinction between the two cases, I should be the last to desire to push *Drylie's* case any further. I think it was Lord Dundas who said it was very near the line. I think it was across the line. He thought it was on the other side. But certainly I think this case is one in which it cannot be said in any popular sense that this man met with an accident, and on that ground I am clearly of opinion, with your Lordships, that we should reverse the determination of the Sheriff-Substitute.

LORD GUTHRIE—I am of the same opinion. Under the statute it is necessary for the applicant to show that the injury in question was a personal injury by accident. In this case it cannot be said that at the place where the man received the injury which led to his death anything happened of the nature of accident. It does not appear what the temperature was or what was the relation between it and the temperature at other places on the day in question. But it is not said that, however that stood, there was anything whatever at the place where he got the injury that was abnormal unexpected, or likely to lead in ordinary circumstances to anything untoward.

It is said, however, by the applicant that there was an accident because at the shaft there was a breakdown—what the case calls a wreck—but it is not said that that

accident had any direct effect whatever as producing any change at the place where the man got the injury—no increase or change in the very strong current of air which led ultimately to pneumonia and death. In the end the necessary element of accident was attempted to be found in the fact that he was unexpectedly at this place and for an abnormal period. Now it seems to me that such connection is not as direct as to bring the case within the scope of what Lord Macnaghten expressed when he said you must find the elements of something unexpected and untoward; it rather comes under the category of an event fairly incident to his employment.

It is admitted that if the man had gone to the shaft in ordinary course, and had stood an hour and a half, in consequence of an order from one of his superiors, there would be no claim whatever, but it is said that if that superior, having given an order that he should go to this particular place intending at once to relieve him, had forgotten that he gave the order, in consequence of which the man had remained there for an hour and a half, there would have been an accident. It seems to me that would be extending the result of the *Drylie* decision very considerably, and I think your Lordships are all of opinion that the Court in that case went about as far as it would be inclined to go. It seems to me in the case of *Drylie* you had two elements wanting in the present case—the element of the place itself being in an abnormal condition, and also the element of the accident to the pump having been the direct cause of producing the abnormal condition in the place where the man stood and received the injury which led to his death.

I concur in thinking that this case is not within the rule of *Drylie*, and that the arbiter has come to a wrong decision.

The Court answered the question of law in the negative and recalled the award of the arbitrator.

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

Counsel for the Respondent—Moncrieff, K.C.—Keith. Agents—Simpson & Marwick, W.S.

Friday, February 7.

FIRST DIVISION.

[Lord Hunter and a Jury.

MACLEOD *v.* EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED.

Reparation—Negligence—Tramway—Contributory Negligence—Passenger Alighting from Car and Crossing Street.

A passenger who had alighted from a north-going tramway car which was travelling on the left set of rails, being in a hurry to get to the east side of the street, rushed round behind the car from which she had just descended, and came in contact with another car which was travelling southwards on the other set of rails, and was injured. In an action at her instance against the tramway company the pursuer admitted that in her hurry to cross the street she had not looked to see if any car was approaching, but had relied on the driver of the oncoming car sounding his bell—as he was admittedly bound to do—but which, according to the pursuer's evidence, he had failed to sound.

The jury having found for the pursuer, the Court set aside the verdict and assoilzied the defenders, *holding* that, even assuming the driver of the south-going car had failed to sound his bell, the accident was due to the pursuer's negligence, in respect (1) that she had never looked to see if any car was approaching, and (2) that the oncoming car was so close upon her when she stepped into the danger zone that nothing could have saved her except that precaution which every pedestrian crossing a street is bound to take for his own safety.

Process—Jury Trial—Verdict for Pursuer Set Aside and Judgment Entered for Defenders — Jury Trials Amendment (Scotland) Act 1910 (10 *Edw. VII and* 1 *Geo. V, cap.* 31) *sec.* 2.

The Jury Trials Amendment (Scotland) Act 1910, section 2, enacts—"If, after hearing parties upon . . . a rule to show cause why a new trial should not be granted . . . on the ground that the verdict is contrary to evidence . . . the Court are unanimously of opinion that the verdict under review is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, they shall be entitled to set aside the verdict, and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial."

Circumstances in which the Court set aside a verdict for the pursuer, and, in place of granting a new trial, *assoilzied* the defenders.

On 30th June 1911 Marion Macleod, domestic servant, 14 Edina Place, Edinburgh, *pursuer*, brought an action against the Edinburgh and District Tramways Company, Limited, *defenders*, in which she claimed £1000 as damages for personal injury sustained, as she alleged, through the fault of the defenders.

The *facts* as stated by the LORD PRESIDENT were—"The history of the accident is simple enough. The young lady was a passenger in a tramway car which was going north. In this country tramway rails are laid in accordance with the rule that cars pass one another to the left of the other rail, and the cars are so arranged that the only exit for passengers