tors have in that country any rights in the bankruptcy of an executor.

The respondent avers that the reclaimer never called upon the pursuers and real raisers to make payment of the amounts contained in the deposit-receipts as falling to him in virtue of his title as trustee, and that he could not do so, as by English law the executry estate did not pass to the reclaimer as trustee on Mr Lennox's estate. The reclaimer does not make any averment on record as to English law, and does not, as I read his pleadings, properly raise the point that the deposit-receipts passed to him as the estate of the bankrupt. He did not oppose the granting, and has not applied for the recal of the sequestration of the estates of the late Lady Sinclair. In my opinion the case of *Menzies* does not apply to the present situation. We are bound to assume that the respondent's appointment was competently made. He is therefore entitled to succeed in the present competition unless the reclaimer can show that the fund *in medio* became beneficially the estate of Mr Lennox upon some specific ground other than the doctrine that the executor is *eadem persona cum defuncto*. This is the hypothesis on which he has framed his claim in the competition, for he founds upon the allegation that Mr Lennox was the creditor of Lady Sinclair in a sum exceeding the amount of the deposit-receipts, and maintains in his plea-in-law that he is entitled to apply or retain the fund to account of that indebtedness.

The respondent does not admit the alleged indebtedness of Lady Sinclair to Mr Lennox, and therefore the plea of the reclaimer could not in any event be sustained without inquiry. I agree, however, with your Lordships that the circumstances disclosed in the present case preclude the necessity of such inquiry and enable us to affirm the Lord Ordinary's interlocutor.

The authorities to which we were referred appear to me to support the view that the right of an executor who is a creditor of the deceased, acquired by confirmation, is to pay himself, without the necessity of raising an action to constitute his debt, out of the funds to which he has confirmed, but that he cannot exercise this right to the prejudice of the other creditors where he knows that the estate is insolvent. Although the executor is not trustee for the creditors it does not follow that he has no duty towards them. In the case of *Taylor & Ferguson* v. *Glass's Trustees*, 1912 S.C. 165, 49 S.L.R. 78, Lord Dunedin explains that although the executor may after the lapse of six months pay *primo venienti*, yet if the creditors come forward in such numbers that he sees that the estate is insolvent it would be his duty to give notice to them to that effect and not pay more to one than to another.

In the present case it is clear from the inventory and schedule of debts that the executor had notice of claims in excess of the estate, and I think that he was only discharging his duty when he took the deposit-receipts, both dated more than six months after Lady Sinclair's death, in name of himself as executor and not as an individual.

LORDS JOHNSTON and MACKENZIE, who had not heard the case, delivered no opinions.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Appellants—Chree, K.C.—M'Robert. Agents — Bonar, Hunter, & Johnstone, W.S.

Counsel for the Respondent—Blackburn, K.C. — A. M. Mackay. Agents — Alex. Morison & Company, W.S.

Tuesday, May 30.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

LYONS *v.* WOODILEE COAL AND COKE COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* (1) 1 — *Accident "Arising out of the Employment" — Workman Catching a Chill by Waiting in a Current of Cold Air at Bottom of Pit Shaft while Inspection of Shaft was Taking Place.*

A workman having finished his work about the hour when the inspection of the pit shaft was beginning proceeded to the bottom of the shaft to be raised to the surface on the upward journey of the cage. The inspection, the duration of which varied according to the repairs required, was prolonged by the breakdown of the bell wire, and the workman was kept standing in a current of cold air and contracted a chill from which he died. *Held* that he was not injured by accident arising out of his employment.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Mrs Catherine Docherty or Lyons, widow of the deceased Denis Lyons, *appellant*, and the Woodilee Coal and Coke Company, Limited, *respondents*, the Sheriff-Substitute (MACDIARMID), at Dumbarton, decided against the appellant, and stated a Case for appeal at her request.

The Case stated—"I found the following *facts* were either admitted or proved—(1) That the said deceased Denis Lyons was employed as a brusher by the respondents in their Woodilee Pit; (2) That his average weekly earnings exceeded £2; (3) That he was a healthy man, and on the evening of Thursday 11th November 1915 in his usual good health; (4) That on said night and the early morning of 12th November he was on the night-shift in said pit; (5) That about 4·30 a.m. he finished his work, and proceeded to the bottom of the said shaft to be taken to the surface; (6) That there was no stated time for brushers on the night-shift to leave off work, and that, except during the inspection after mentioned, the practice

was for them to be taken to the surface when they arrived at the shaft bottom; (7) That the daily statutory inspection of the shaft began about 5 a.m. every morning; (8) That the inspection was made in order to ascertain that the shaft was in working order, that repairs had frequently to be made, and that the time which the inspection would take on any particular morning could not be calculated, depending, as it did, *inter alia*, on the extent of the repairs found to be necessary, but that generally speaking it took an hour—half-an-hour going down and half-an-hour going up; (9) That during the inspection miners had as a rule one chance of being taken to the surface, *i.e.*, when the cage was about to begin its upward journey; (10) That these facts were known to the deceased workman; (11) That on said 12th November he arrived at the bottom of the shaft about 5 a.m.; (12) That owing to a breakdown of the bell wire the repairs on that morning took longer than usual, the cage taking about an hour to descend; (13) That during that time the deceased workman was at the bottom of the shaft in a cold current of air; (14) That owing to said exposure he contracted a chill, upon which tonsilitis, kidney trouble, and pneumonia supervened, with the result that on 26th November 1915 he died of the latter disease."

The *question of law* for the opinion of the Court was—"On the facts stated could I competently find that the deceased workman was not injured by accident arising out of and in the course of his employment?"

The Sheriff-Substitute's note was in the following terms:—

Note.—"There is, I think, no doubt that the death of the workman in this case was the result of an injury due to an event arising out of and in the course of his employment. The main point argued was as to whether that event was or was not an accident. The pursuer's agent contended that the case was not distinguishable from *Coyle or Brown*, 1914 S.C. (H.L.) 44, and *Drylie*, 1913 S.C. 549, and the recent House of Lords decision in *Welsh*, 1916, 53 S.L.R. 311, was also relied on. It humbly appears to me that the case falls rather into the category of cases of which *M'Luckie* v. *John Watson, Limited*, 1913 S.C. 975, is an example. It was known to the deceased workman that the daily inspection of the shaft took place between 5 and 6 a.m., and, although it was quite unnecessary for him to do so, he left off work and came to the bottom of the shaft at 5 a.m. He had accordingly to wait until the inspection of the down shaft was finished. On that particular morning it admittedly took longer than usual, and he had to wait an hour instead of half-an-hour. But just exactly how long the inspection would take on any particular morning could not be calculated, and a man who came to the shaft about the time when the inspection was due or in progress must, it appears to me, be held to have taken the risk of having to wait for a longer or shorter time. How long or how short a time the inspection would take depended upon the repairs which proved necessary, and the very *raison d'être* of the inspection was to repair the shaft where and when necessary.

"It is said that the breakdown of the bell wire was the accident which led to the exposure and the consequent injury. That seems to me fallacious. If anything can be said to have been 'an unlooked-for mishap or untoward event which was not expected or designed,' the delay in the descent of the cage would appear to have been the accident, but that delay was, as it seems to me, neither unlooked-for nor untoward, for it was, I think, merely a normal event, sometimes of longer, at other times of shorter duration, in the working of the mine.

"Then, again, it is said, on the analogy of *Welsh's* case, that the accident was, in any event, the miscalculated effect of the prolonged exposure to the draught of cold air. It does not appear to me that there is room for that argument in a case where the man exposes himself not at the command of his superior but of his own free will and choice.

"I am therefore of opinion that the deceased workman was not injured by accident."

Argued for the appellant—The workman was injured by accident. He had not elected to put himself in the position which exposed him to the cold air, and that distinguished the case from *M'Luckie* v. *John Watson, Limited*, 1913 S.C. 975, 50 S.L.R. 770, for there the workman on his own initiative immersed himself in cold water for his own purposes. When the surrounding circumstances of the man's illness were known, and disclosed such facts as the present, the proper inference was that the illness was due to accident—*Coyle or Brown* v. *John Watson, Limited*, 1914 S.C. (H.L.) 44, *per* Lord Dunedin at p. 45, Lord Atkinson at p. 48, Lord Shaw at p. 51, Lord Parmoor at p. 53, 51 S.L.R. 492. The breakdown of the bell wire was an interference with the normal conditions. If it was not the accident, then the abnormal delay resulting was—*Glasgow Coal Company* v. *Welsh*, 1915 S.C. 1020, 52 S.L.R. 798, 1916, 53 S.L.R. 311, [1916] 2 A.C. 1, for it was an unlooked for mishap. If neither of the foregoing was the accident, the unlooked for result of the exposure upon the workman's power of resistance, together with the abnormality in the working of the mine, was the accident—*Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437; *Kelly* v. *Auchenlea Coal Company, Limited*, 1911 S.C. 864, *per* Lord Kinnear at p. 869, 48 S.L.R. 768; *Coyle or Brown* v. *John Watson, Limited* (*cit. sup.*).

Argued for the respondents—The appellant was not injured by accident. There was nothing abnormal here; the usual inspection of the shaft was taking place, and the cage for which the workman was waiting was performing its functions normally. In *Doyle* v. *Alloa Coal Company*, 1913 S.C. 549, 50 S.L.R. 350, and *Brown's* case (*cit. sup.*), there were abnormal circumstances. In any event the question was one of fact for the arbiter.

LORD JOHNSTON—Unless we could hold that all diseases contracted by a workman in the course of his employment must be regarded as personal injuries by accident within the meaning of the Workmen's Compensation Act, I do not see how we could come to a conclusion favourable to the appellant here. But we cannot so hold —*Brintons, Limited* v. *Turvey*, [1905] A.C. 230, and *Welsh's* case, 1915 S.C. 1020, and [1916], 2 A.C. 1. One must attend to the words "within the meaning of the Workmen's Compensation Act," and that requires to be substituted "arising out of and in the course of the employment." Here I can find nothing which differentiates the case from that of any disease contracted by the workman in the course of his employment. There is nothing to justify one's saying that it arose out of the employment.

When I read the Sheriff's note I think not only that he was entitled to find on the facts as he did, but that I should have done the same. This workman finished his work at 4·30 a.m.—that was his own choice—and proceeded to the bottom of the shaft, where he arrived at 5 a.m. to be taken to the surface. There was no stated time for brushers on the night shift to leave off work; and if they did so, except only during the period of the inspection of the shaft, the practice was for them to be taken to the surface as soon as they arrived at the shaft bottom. But then this workman chose to break off work so as to bring himself to the bottom just at the time when the statutory inspection of the shaft was commencing. It was a perfectly normal thing that just at that part of the twenty-four hours delay in taking men to the surface occurred, extending often to an hour or more. The appellant could not expect to be taken to the surface immediately on his arrival at the pit bottom at that particular point of time, but must await the course of the statutory shaft inspection. He had to do so in the normal working of the mine. He caught a chill which developed into pneumonia.

It may be possible to regard the chill as accidental, and the pneumonia ensuing on the personal injury, or it may be more proper to say that the chill was both accident and injury, but it cannot be said that in either view the personal injury arose out of the employment.

I propose therefore that we answer the query in the affirmative.

LORD MACKENZIE — I am of the same opinion. The learned arbitrator has correctly stated the question for the consideration of the Court — "On the facts stated could I competently find that the deceased workman was not injured by accident arising out of and in the course of his employment?"

Now on a consideration of the facts found he has found that the workman was not entitled to compensation; and unless he was able from the facts to draw the inference that the disease was attributable to some particular event or occurrence of an unusual or unexpected character, then obviously he was quite right in the conclusion which he reached.

On the facts as found it appears to me that the pit was being worked on the particular morning in question in a perfectly normal way, and the fact that the cage took half an hour longer than usual to reach the bottom cannot be regarded as an occurrence of an unusual or unexpected character. Nor can the breakdown of the bell-wire be so regarded. That was just one of the occurrences which were to be expected in the pit, and the object of making the statutory inspection of the shaft was that such a breakdown might be repaired. Therefore unless we are to hold that it is a particular event or occurrence of an unusual or unexpected character when a man catches cold, I am unable to see how the appellant can establish a right to compensation.

LORD SKERRINGTON — I am of the same opinion.

The LORD PRESIDENT, who had not heard the case, delivered no opinion.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Moncrieff, K.C.—Scott. Agents—Weir & Macgregor, S.S.C.

Counsel for the Respondents — Watson, K.C.—M'Robert. Agents —W. & J. Burness, W.S.

Tuesday, February 22.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CRONE *v.* DONALDSON LINE, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (3)—"*Question*" *Arising under the Act* —*C.A.S.* (1913), *L, xiii*, 2.

The Workmen's Compensation Act 1906 enacts, section 1 (3)—"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . the question, if not settled by agreement, shall . . . be settled by arbitration. . . ."

The C.A.S., 1913, enacts, L, xiii, 2—"An application for the settlement of any claim for compensation under the Act shall not be made unless and until some question has arisen between the parties and such question has not been settled by agreement. The application shall state concisely the question which has arisen."

A workman wrote to his employers on 4th November 1915, alleging that he had been incapacitated by accident arising out of and in the course of his employment, and requesting a reply within the next three days as to whether they admitted liability. The employers replied on 5th November, requesting the workman to submit himself to a medical examination, and stating that they would then be in a