

law seems clearly in favour of the pursuers' contention. At page 20, under the heading of "Builders and Architects," Mr Nash cites the case of *Nelson v. Pickwick Associated Company*, reported in vol. 30, Illinois Appeals, as deciding "There is an implied contract on the part of the owner to keep work in such a state of forwardness as will enable the builder to perform his contract within a time limited." Again, under the sub-head of "Excuses for delay" he cites the case of *Taylor v. Renn*, 79 Illinois, 181, as deciding "A person employing another person to do certain work impliedly agrees to keep such work far enough in advance to enable such person to perform his work within the time agreed upon, and the builder is not liable when the owner does not do so." On the other hand he quotes the case of *Reichenbach v. Sage*, 52 American State Reports, 51, as authority for the qualifying doctrine—"The delay is not excused when it resulted from the act or omission of a contractor employed by the builder," subject, however, to the builder's right to recover from his sub-contractor the amount he was required to pay the owner of the building for the delay.

In this case I think it is clearly proved that the reason of the pursuers' delay between 15th April, the contract date, and the beginning of June, when the work was finished, was primarily the delay of the masons beyond 15th March, their contract date, and secondarily, the delay of the plasterers beyond 31st March, which was intended by the defenders to be the plasterers' limit. If the time limit is out of the case and the question depends on what was a reasonable time for the pursuers to finish their part of the work, I think the defenders have failed to prove that the pursuers occupied more than a reasonable time in finishing their department of the whole job.

But there is another and simpler view of the case, on which I think the pursuers are equally entitled to prevail. They contracted with the defenders on the footing of the contracts with the mason, plasterer, and plumber, which they were informed had been entered into. But it now turns out that through the defenders' negligence the alleged contract with the plasterer was never executed, and it is proved that some at least of the pursuers' delay beyond the contract period was due to the plasterers exceeding the time to which, when the joint scheme was framed, it was intended by the defenders that they should be limited. In this view, even if the defenders' construction of the pursuers' obligation as unconditional, independent, and absolute were well founded, they would be barred from enforcing the pursuers' contractual time limit, because the pursuers would then be able to claim the benefit of the second case, in which the pursuers, in the defenders' view, might be excused, namely, the fault of the employer.

In regard to the counter claims put forward by the defenders, I agree with your Lordship in rejecting them.

The Court pronounced this interlocutor—

"Dismiss the appeal: A firm the interlocutors of the Sheriff and Sheriff-Substitute appealed against: Find in fact and in law in terms of the findings in the interlocutor of the Sheriff-Substitute dated 6th April 1914: Of new sustain the fourth plea-in-law for the pursuers, repel the defences, and decern against the defenders for payment to pursuers of the sum of three hundred and thirteen pounds (£313) sterling with interest as craved. . . ."

Counsel for the Appellants (Defenders)—
A. O. M. Mackenzie, K.C.—A. M. Mackay.
Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents (Pursuers)—
Blackburn, K.C.—W. T. Watson. Agents
W. & W. Haig Scott, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

GLASGOW COAL COMPANY, LIMITED
v. WELSH.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—"Accident"—Sub-acute Rheumatism Following upon Chill Due to Standing in Water which had Accumulated in a Mine through Breakdown of a Pump Five Days Previously, and which Workman was Engaged in Baling out in Obedience to Orders.

In consequence of the breakdown of a pump in a mine on 23rd October 1914 a large quantity of water accumulated in a pit-bottom. On 28th October a brusher, in obedience to orders, was engaged for eight hours in baling out the water. In order to do so it was necessary for him to stand up to his chest in the water. Sub-acute rheumatism supervened as the result of the exposure and rendered him unfit for work. In an application by the workman for compensation under the Workmen's Compensation Act the Court sustained an award of compensation by the arbitrator, *holding* that the occurrence in the mine on 28th October was an "accident."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 8, applies the Act to industrial diseases, and enacts, sub-sec. 10—"Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident within the meaning of this Act."

Patrick Welsh, miner, Bridgeton, Glasgow, *respondent*, brought in the Sheriff Court at Glasgow an arbitration under the Workmen's Compensation Act 1906, claiming compensation from the Glasgow Coal Company, Limited, *appellants*. The Sheriff-

Substitute (MACKENZIE) as arbitrator awarded compensation and stated a Case for appeal.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906 brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of the respondent, in which the Sheriff was asked to grant a decree against the appellants for payment to the respondent of £1 per week as compensation under said Act from and after the 2nd day of November 1914 till the further orders of Court, with expenses.

"The case was heard before me, and proof led on this date (2nd March 1915), when the following facts were established:—1. That the respondent is a miner residing at 13 Pentland Place, Bridgeton, Glasgow, and the appellants are coalmasters at 142 St Vincent Street, Glasgow. 2. That the respondent on 23rd October 1914 was working in the appellants' employment as a brusher at their Newton Pit, Kenmuirhill Colliery, and that the last period of his employment in said colliery had been for two weeks prior thereto. 3. That on said date the water-pump in said colliery broke down, and a large quantity of water accumulated in the pit-bottom, in consequence of which work in the pit was suspended. 4. That on 28th October 1914, at about 10 p.m., the respondent was directed to go down the pit, and went down the pit in the belief that he was going to his ordinary work as a brusher; that when he got down the pit he was directed to bale the water therefrom; that in order to do so it was necessary for the respondent to stand up to his chest, and he did stand up to his chest in the water; and that he was engaged in this work for eight hours. 5. That the respondent thereafter and for two or three days felt great stiffness and cold and pains in his joints, but continued to work until the morning of 2nd November 1914, when he started to go to his work but had to turn back owing to his physical condition. 6. That he consulted Dr Barret on 3rd November 1914, and was found by him to be suffering from sub-acute rheumatism and unfit for work. 7. That he continued in this condition from 2nd November 1914 until 25th January 1915; that from 26th January 1915 until 2nd March 1915 he was able to earn the sum of 23s. 6d. per week; and that since 2nd March 1915 his incapacity for work had ceased. 8. That at the time of the accident the weekly earnings of the respondent amounted to 40s. 9. That the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question.

"I found in law (1) that this was an injury caused by accident arising out of and in the course of the respondent's employment with the appellants, and (2) that the appellants were liable to the respondent in compensation. I assessed the same at 20s. per week from 2nd November 1914 to 25th January 1915, and at 8s. 3d. per week from 26th January 1915 to 2nd March 1915, and found the appellants liable to the respondent in expenses."

The question of law for the opinion of the Court was—"Was there evidence upon which it could competently be found that the incapacity of the respondent was attributable to accident arising out of and in the course of his employment with the appellants?"

Argued for the appellants—The arbitrator was wrong. The present case was distinguishable from *Drylie v. Alloa Coal Company, Limited*, 1913 S.C. 549, 50 S.L.R. 350, and *Brown v. John Watson, Limited*, 1913 S.C. 593, 50 S.L.R. 415, *rvd.* 1914 S.C. (H.L.) 44, 51 S.L.R. 492. There must be a definite accident involving something unusual, unexpected, and undesigned, and connected with the supervening illness in the relation of cause and effect—*per* Lord Dundas in *Drylie v. Alloa Coal Company, Limited*, 1913 S.C. 553, 50 S.L.R. 353. In the present case there was an interval of five days between the breakdown of the pump and the respondent's immersion, and there was the intervention, *ex intervallo*, of an order from the employer's representatives which broke the chain of causation—*M'Luckie v. John Watson, Limited*, 1913 S.C. 975, 50 S.L.R. 770, referred to by Lord Dunedin in *Brown v. John Watson, Limited*, 1914 S.C. (H.L.) 45, 51 S.L.R. 492. In order to show that there was an "accident" it must be possible to point to (a) a specific time when the accident occurred, (b) the circumstances, and (c) the place where the "accident" occurred, and the respondents could not do this—*per* Lord Mackenzie in *Drylie v. Alloa Coal Company, Limited*, 1913 S.C. 560, 50 S.L.R. 357; *M'Millan v. Singer Sewing Machine Company, Limited*, 1913 S.C. 346, 50 S.L.R. 220; *Coe v. Fife Coal Company, Limited*, 1909 S.C. 393, 46 S.L.R. 328; *Barbeary v. Chugg*, (1915) 8 B.W.C.C. 37; *Eke v. Hart-Dyke*, [1910] 2 K.B. 677; *Broderick v. London County Council*, [1908] 2 K.B. 807; *Steel v. Cammell, Laird, & Company, Limited*, [1905] 2 K.B. 232. *Sheerin v. Clayton & Company*, [1910] 2 I.R. 105, was the extreme limit to which the decisions had gone, and there the Court merely refused to disturb the findings of the arbitrator. [*Ismay, Imrie, & Company v. Williamson*, [1908] A.C. 437, was referred to by Lord Johnston.]

Argued for the respondents—The arbitrator was right. The workman had suffered an injury by "accident." The accident was either the occurrence on 23rd October or the occurrence on 28th October. The Act recognised that a disease although not an "industrial" disease might be a proper ground for compensation—section 8, sub-section 10. The present case was indistinguishable from *Drylie v. Alloa Coal Company, Limited* (*cit.*), and *Brown v. John Watson, Limited* (*cit.*). The cases of *Kelly v. Auchenlea Coal Company, Limited*, 1911 S.C. 864, 48 S.L.R. 768; *Stewart v. Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80; *Maskery v. Lancashire Shipping Company, Limited*, (1914) 7 B.W.C.C. 428; *Clover, Clayton, & Company, Limited v. Hughes*, [1910] A.C. 242, *per* Lord Loreburn, L.C., at 245; *Steel v. Cammell, Laird, & Company, Limited*, [1905] 2 K.B. 232; and *Fenton*

v. *Thorley & Company, Limited*, [1903] A.C. 443, per Lord Macnaghten at 446, were also referred to.

At advising—

LORD JUSTICE-CLERK—This is a case arising out of an arbitration under the Workmen's Compensation Act 1906, in which the arbitrator found the respondent entitled to compensation.—[His Lordship narrated the facts set forth in the case and the findings of the arbitrator.]

There are two dates of importance stated in the case. The first is 23rd October 1914, when the pumps broke down and the water began to rise, and the second is 28th October 1914, when the respondent went to work in the accumulated water at the bottom of the pit with a view to the reduction of its amount. In the course of the argument counsel for the respondent did not distinctly state whether the accident on which they founded was the accident of 23rd October—namely, the breakdown of the pump—or whether it was the accident of 28th October, when the respondent entered the water as directed in order to bale it out. It appears to me that the arbitrator by his 9th finding—that the rheumatism from which the respondent suffered was caused by the extreme and exceptional exposure to cold and damp to which he was subjected on the occasion in question—must have been of opinion that the accident, if accident there was, took place on the later day.

An argument was founded on both dates—the 23rd October as well as the 28th October—my opinion is that the accident of 23rd October cannot be regarded as an accident which in a legal sense led to the injury suffered by the respondent. After the pump broke down the men left the pit quite safely and without having received any shock or injury that could have resulted in the ultimate illness from which the respondent suffered, and the interval of five days, taken along with the order which was given on the 28th October, separated the accident of the 23rd completely and effectively from any evil consequences that occurred to the respondent.

I am accordingly of opinion that cases like *Drylie v. Alloa Coal Company*, 1913 S.C. 549, and *Brown v. John Watson Limited*, 1914 S.C. (H.L.) 44, do not directly apply to the present case. There was no order given in *Drylie's* case. On the other hand there was an order given in *Brown's* case by which the workmen were ordered to go up, not by the shaft that in ordinary circumstances they used, but by a different shaft. Moreover, the whole series of incidents in both these cases took place immediately upon the accident, and I do not think that the rule which was laid down or the expressions of opinion which were made in those two cases can apply in the present case.

We have then to consider what in law is the effect of the incident of 28th October. The arbitrator has found as a fact that the exposure to which the respondent was subjected upon that date by his having to

work in the accumulated water was the cause of the rheumatism which led to his being incapacitated. Accordingly, to my mind, the question is whether in law there can be said to have been an accident occurring on 28th October, when undoubtedly the mischief was originated which culminated in acute rheumatism and the respondent's incapacity.

Before the passing of the Workmen's Compensation Act 1906, which directly introduced industrial diseases as being a fit ground for compensation, the section which was founded on in the course of the debate—section 8, sub-section 10—had been prepared for by certain judgments under which, although the incapacity was due to disease, it was yet recognised that disease might be a proper ground for giving compensation under the Act. Two or three cases bearing on this matter were cited. One of the earliest was the Scottish case of *Stewart v. Wilsons and Clyde Coal Company, Limited*, 5 F. 120, in which a passage by Lord McLaren has been accepted as correctly stating the law—"If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, I consider that this is accidental injury in the sense of the statute." And in the same case Lord Kinneir spoke of the injury as being not intentional and as being unforeseen.

Both of these expressions of opinion were quoted with approval in what I think has been accepted as one of the leading cases, if not the leading case, in this branch of the law—the case of *Fenton v. Thorley & Company, Limited*, 1903 A.C. 443. In that case Lord Macnaghten expressed himself thus (p. 448)—"Accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." And Lord Lindley in *Brintons Limited v. Turvey*, 1905 A.C. 230, expressly said that the meaning of the word "accident" was settled by the House of Lords in *Fenton*.

Accordingly I take it that before the 1906 Act it was quite settled that although the ultimate cause of incapacity was disease, that did not prevent the case from falling within the scope of the statute as being a personal injury by accident.

Now the 10th sub-section of section 8 of the Act of 1907 quite clearly recognised that state of the law, because it runs thus—"Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply if the disease is a personal injury by accident within the meaning of this Act." To my mind this case is covered by two cases which were decided subsequent to the passing of the Act—first, the case in the House of Lords of *Ismay, Imrie & Company v. Williamson*, 1908 A.C. 437, and second, the Irish case of *Sheerin v. Clayton & Company*, 1910, 2 I.R. 105. In the former case a fireman who was engaged in drawing ashes from the furnace of an ocean-going steamer was affected by what was called a heat stroke—so seriously affected that he died.

In that case the House of Lords, consisting of Lord Loreburn, Lord Ashbourne, and Lord Macnaghten, came to the conclusion that an accident in the proper sense of the term, as the statute had been interpreted by judicial authority, had taken place, and that accordingly the fireman's representatives were entitled to compensation. Lord Macnaghten dissented from that judgment, but there it stands as a judgment of the House of Lords and as such must be treated.

In the case of *Sheerin* an Irish workman was asked to clean out a mill-race, and in consequence of the extreme cold to which he was subjected by his work in the mill-race he was incapacitated, and the Irish Court, following the judgment of the House of Lords in *Ismay*, came to be of opinion that he was entitled to compensation.

In my opinion, accepting the 28th of October, when Welsh went into the pit bottom to attempt to bale out the water, as being the true date at which we have to look, and as the date of the origin of the injury, I am of opinion that in the legal sense of the term, as the phrase "personal injury by accident" has been interpreted, there was then an accident which resulted in personal injury to him, and that accordingly he was entitled to compensation. We should therefore answer the question which the learned arbitrator has put to us in the affirmative.

LORD JOHNSTON—This case is one of a class, of which there have been recent examples, in which death has resulted from a definite disease engendered by something occurring in the course of the employment. It may be that if the judgment of the learned Sheriff is sustained the result can be said to be an instance of former decisions compelling to a further extension beyond the intention of the Act, by reason that the cause of the injury was something which must be regarded as deliberate and not accidental. Were I obliged to surrender to that contention I should regret it, for the deliberate element here was an order from the employers' representative which the workman was not bound to obey but did obey, and it would be a misfortune that a sound application of the statutory provisions should require that a workman who has suffered from a sequence of events following on something accidental, should receive compensation under the Act, and another workman who has suffered from the same sequence of events, following on obedience to his master's order, should be denied it. In my opinion that is not a necessary result in this case, but I recognise that its decision may involve an advance on prior cases, and that it is not easy to reconcile it with much that may be culled from the judgments of those who have decided them.

The precise circumstances may be very briefly stated.

The respondent was on 23rd October 1914 engaged as a brusher in the appellants' pit. On that day an accident occurred to the pumping machinery. Water accumulated at the pit bottom and work was stopped.

Five days afterwards, on 28th October, the respondent was sent down the pit, and went in the belief that he was going to his ordinary work as brusher. When he reached the bottom he was directed to bale out the water which had collected. To do so he had to stand in water up to his chest, and was so engaged for eight hours.

The respondent continued at work—I assume his ordinary work—till 2nd November, though suffering from great stiffness and cold and pains in his joints. On 2nd November he was found to be suffering from sub-acute rheumatism, and was incapacitated till 2nd March 1915.

Now these circumstances differ from those in the recent cases of *Drylie*, 1913 S.C. 549, and *Brown v. John Watson, Limited*, 1914 S.C. (H.L.) 44, in that there was a break of five days between the accident to the pump and the exposure to the influence of cold water, and that the exposure was not a natural and direct sequence of the accident to the pump, but rather the result of the intervention, *ex intervallo*, of an order from the employer or his representative. The term "chain of causation" is one which I have always thought has been pressed too readily into service in this class of case, and I am glad to find Lord Macnaghten saying in *Clover, Clayton, & Company, Limited*, [1910] A.C. at p. 247, in referring to the case of *Fenton v. Thorley*, [1903] A.C. 443—"There the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do, the occurrence cannot be called an accident. There must be, it was said, an accident and an injury; you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation." I think that these words are of much assistance in disposing of the present case. But meantime, whatever may be said about the relation between the injury and the accident, it cannot possibly be maintained, as it was in the cases of *Drylie* and *Brown*, that there was any connection between the accident to the pump in this case and the disease resulting from the respondent's chill.

Before going further I would refer to what Lord Lindley says in giving judgment in the House of Lords in the case of *Brintons Limited v. Turvey* (the anthrax case), [1905] A.C. at p. 237—"I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen's Compensation Act. That is very far from being my view of the Act, and I concur with the observations made by Cozens-Hardy, L.J., on this point at the end of his judgment. In this case your Lordships have to deal with death resulting from disease caused by an injury, which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of disease does not render the cause not an accident. Whether in any particular case an injury in the shape of disease is caused by an accident or by some other

cause depends on the circumstances of the case, and on the meaning to be attributed to the word 'accident.' The meaning of the word as used in the Workmen's Compensation Act was settled by this House in *Fenton v. Thorley & Company, Limited*, and having regard to that authority and to the facts of this case as stated by the learned County Court Judge, his decision and the decision of the Court of Appeal were, in my opinion, quite right." The accident in *Brintons'* case was the lighting of a bacillus of anthrax on a tender part, the eye, of the workman, whence it made its way into his system.

But I would also refer, and that particularly, to the Act itself, section 8, which provides for its application to cases of industrial disease, and in passing would note that the anthrax case was decided before its date. The section, sub-section (1), itself provides that where a workman is certified to be suffering from a scheduled disease, and the disease is due to the nature of his employment at the time or within the past twelve months, he is to be entitled to compensation "as if the disease . . . were a personal injury by accident arising out of and in the course of that employment;" and adds, sub-section (10), "Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply" (i.e., a non-industrial disease) "if the disease is a personal injury by accident within the meaning of this Act," i.e., arising out of and in the course of the employment.

In its positive provision this section undoubtedly provides that a disease of the class, now conveniently described as industrial, is for the future to be regarded as the composite entity "a personal injury by accident." In 1906 therefore the Legislature were not concerned, when legislating in terms which were to be popularly understood, with distinguishing between accident and injury, and with fine drawn theories of chains of causation. All that they required as precedent to the application of the new provision was that the workman should be certified as suffering from the disease, and that the disease should be due to the nature of his employment, &c. But the reservation in sub-section (10) carries the matter a great deal farther. It does not bear upon the question merely prospectively, but distinctly recognises that independently of the new legislation regarding the special category of industrial diseases, disease has all along been a possible personal injury by accident within the meaning of the Act, and that a workman has had under the original Act of 1897, and will continue to have, a right to recover compensation in respect of disease generally, if the disease is a personal injury by accident within the meaning of the Act. In truth the section does not for the first time make an industrial disease a possible personal injury by accident—that it was before its date. What it does is to provide for cases of disease gradually contracted, within certain defined limits, and for the contraction in

the service of more than one employer. That is all.

Were I free to apply myself to the present question without the guidance of prior authorities I should have little difficulty in concluding that injury by accident is a composite idea; that there are cases, probably the majority, in which the accident and the injury are distinct and follow as cause and effect; but that there are other cases in which the accident and the injury cannot be segregated or distinguished as definite cause and definite effect, in which latter category fall cases of disease, and that provided the disease has been contracted in the course of the employment, and the contraction has arisen out of the employment—that is, is attributable to the employment—the right to compensation will accrue just as fully as if there were a separable accident and injury.

But it is not every case of disease contracted in the course of the employment which will come under the category of injury by accident. Thus where scarlet fever has been introduced into a workroom or factory by an infected workman and spreads among his fellow-workmen, their case is one of disease contracted in the course of, but not arising out of, the employment. But then I should hold, differing from the learned Judges who decided these cases, that the lead-poisoning case—*Steel v. Cammell, Laird, & Company*, [1905] 2 K.B. 232—and the sewer gas case—*Broderick v. London County Council*, [1908] 2 K.B. 807—were cases in which the disease was not only contracted in the course of, but arose out of, the employment. The difference is sharply put in the dissenting opinion of Lord Robertson in *Brintons Limited v. Turvey*, when he asks—Is there an accident distinct from the disease, or is the accident simply the inception of the disease? His Lordship held that there must be the former. I humbly think that the latter, I do not say will, but may, on a sound construction of the statute, suffice.

But as I cannot rely upon my own opinion where so many eminent Judges, particularly in the House of Lords, have pronounced themselves to a different effect though not having the present case before them, I shall endeavour to see whether my practical conclusion cannot be reconciled with their grounds of judgment. In doing so I think I may say that this particular subject is eminently one in which it is unsafe to divorce the words used by a judge from the subject-matter of the case which he is trying, and to assume that he is necessarily enunciating general propositions intended to be applicable to all cases irrespective of circumstances. That is, I think, well illustrated by the words of Lord Lindley in *Brintons Limited v. Turvey*, which I have quoted above, where he couples the meaning to be attributed to the statutory expression and the circumstances of the case as the two elements which contribute to a decision.

Now the accepted interpretation of the term "injury by accident" is that given by Lord Macnaghten in *Fenton v. Thorley*. He there held that "injury by accident" was a compound expression equivalent to "acci-

dental injury," and that the whole conception was qualified by the terms "arising out of and in the course of the employment," and came to the conclusion "that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." But even Lord Lindley, though accepting Lord Macnaghten's definition, two years afterwards, in the words which I have already quoted, speaks of the fact that "an accident causes injury" as though the two though co-existing had to be separately ascertainable, and this is in accordance with the language used by many other judges. For instance, Lord Dundas in the case of *Drylie* thinks that you must have a definite accident of some sort, and Lord Dunedin in the case of *Brown v. John Watson, Limited*, fixes on the accident interfering with the normal working of the mine as leading by a series of consequential results to the illness in question. Here I think his language must be read with reference to the particular circumstances of the case. I find, however, that his Lordship in *Drylie's* case, which was referred to with approval in that of *Watson*, expresses himself thus—"The fact of disease is not an accident, but the contraction of disease may be by accident. When you seek to apply that doctrine to the question in the present case, namely, was this disease of which the man died contracted by accident? it seems to me you have to answer two questions. The first question is, was it contracted in consequence of what happened on the 25th September? or is it impossible to say when and where it was contracted?" This may be read as indicating that his Lordship, while prepared to accept the contraction of disease as an injury in the sense of the statute, still looked for a definite accident whereby that contraction took place. But again, reading his words in the light of the case with which he was dealing, I am not satisfied that had he been dealing with the circumstances of the present case he would not have supported the wider application which I have ventured to adopt. Still if the narrower be the sole and necessary interpretation of the statute, and I am required to put my finger on some definite point in the history of this case which can be regarded as the accident causing the contraction of the disease, I must first carry with me Lord Macnaghten's approved dictum that "the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed." So doing if the contraction of the disease known as rheumatism be the injury, then it seems to me that it may be quite correctly said that the chill resulting from the immersion was a mishap or untoward event undesigned and unlooked for either by the oversman or by the workman when the former directed the latter to enter the collection of water for the purpose of baling it out, and when the latter entered it in obedience to that order, and that that chill may be regarded as the accident which *ex hypothesi* it is necessary

to find. I would not, however, for choice adopt this ground of judgment.

There is another class of cases which was referred to, such as *Steel v. Cammell, Laird, & Company*, and *Eke v. Hart-Dyke*, [1910] 2 K.B. 677, in which claims were rejected on the ground that you must have time, circumstance, and place of accident definitely ascertained for the purpose of notice under section 2 (1) of the statute, otherwise you cannot have an accident in the terms of section 1 (1). That principle would lead to the rejection of the claim here. I cannot think that this ground of judgment is sound. In the case of *Drylie*, for instance, it would lead to requiring notice to be given as from the date of the accident to the pump, which would appear somewhat absurd. If my view is correct on either alternative it would amply satisfy section 2 (1) if notice were given as from the date of the disease definitely supervening or from the date of the chill being encountered. On no reasonable construction do I think that want of definiteness in either of these can form a bar to the claim. I therefore think, not only that there was evidence before the Sheriff-Substitute upon which it was competent for him to find that the incapacity of the respondent was attributable to accident arising out of and in the course of his employment, but that he came to a sound conclusion in so finding.

LORD GUTHRIE—In this case I think the findings disclose facts sufficient to warrant the arbitrator's conclusion in law. The case seems to me indistinguishable in any essential features from the cases of *Drylie*, 1913 S.C. 549, and *Brown v. John Watson, Limited*, 1913 S.C. 593, *rev.* 1914 S.C. (H.L.) 44.

The appellants maintained that the present case differed from these cases in two essential respects—the first of these was the interval of time, five days, which elapsed between the breakdown of the pumps on 23rd October and the respondents' eight hours' immersion on 28th October. But even assuming that it is only by reference to the breakdown of the pumps on the 23rd that the respondent's injury can be attributed to accident for which the appellants are responsible, no break in causation took place; and it cannot be said (as might be said in the case put by Mr Cooper of a pit flooded for years) that the flooded condition of the pit had become its normal state.

The second attempted distinction was founded on the fact that in this case the workman was acting under orders at the time when he contracted the sub-acute rheumatism, for the incapacitating effects of which he claims compensation. It was pleaded that whatever accident there might have been to the pumps on the 23rd, the chain of causation was broken and a *novus actus* had arisen on the 28th. I do not see the bearing of this fact on the question the arbitrator had to consider. But it is enough to say that in the case of *Watson Limited* the element of acting under orders was equally present.

But if these cases could be distinguished on either or both the grounds above discussed, I think the arbitrator was entitled to find the element of accident sufficiently present in the accidental circumstances of 28th October, namely, first, the accidental accumulation of water the temperature of which produced his injury; second, Welsh's accidental employment at the work of baling, he having gone down the pit to engage in brushing; and third, the accidental attack of sub-acute rheumatism, from which none of the other persons employed in baling seem to have suffered.

The Court answered the question of law in the affirmative.

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

Counsel for the Respondent—A. O. M. Mackenzie, K.C. —Dykes. Agents—J. Douglas Gardiner & Mill, S.S.C.

Tuesday, July 20.

SECOND DIVISION.

(SINGLE BILLS.)

DAVIDSON v. SCOTT.

(Reported *supra*, p. 736.)

Expenses—Taxation—Skilled Witness—Certification by Judge—C.A.S., K, iv, 1, App. 1, v, 3 (2).

The Codifying Act of Sederunt provides, K, iv, 1, App. I, v, 3 (2)—“ . . . In cases where it is found necessary to employ professional or scientific persons such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants, to make investigations previous to a trial or proof, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall—on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session—certify that it was a fit case for such additional allowance.” *Held*, after consultation with the Judges of the First Division, that the motion for a certificate for skilled witnesses should be made at the conclusion of the proof or trial, and that when this is not done the application must be made in the motion roll after notice to the other side, but without any allowance for enrolment or discussion.

Expenses—Skilled Witness—Valuator—Fee.

Held that a valuator belonged to the class of professional persons who were entitled to a fee of £2, 2s. per day for attendance as witnesses, but that a valuator who came from London was not entitled to a higher fee than a Scottish valuator.

Expenses—Taxation—Printing—Use of Prints in Prior Action between Same Parties.

By arrangement between the parties certain prints which had been printed in a prior action between the same parties were utilised in the second action. But for this arrangement a large part of the previous proof might have required to be again led and the documents to be reprinted. The successful defender in the second action had been the unsuccessful complainer in the prior action and had been found liable in expenses. *Held* that the successful defender in the second action had rightly been allowed by the Auditor the expenses of the printing.

Expenses—Taxation—Fees to Counsel.

Held (1) that a special consultation fee to counsel, to consider to what extent the evidence and documents in a previous action could be utilised, must be disallowed where a full consultation fee for consultation regarding proof had been allowed, and (2) that when debate fees of £15, 15s. and £12, 12s. were sent to senior and junior counsel respectively for the first day's debate, and the debate was adjourned on the first day after a discussion lasting twenty minutes, a second day's fees must be disallowed.

Donald Davidson, High Street, Granttown-on-Spey, *pursuer*, brought an action against Miss Jessie Scott, residing at Nellfield Lodge, Braidwood, Lanarkshire, *defender*, for declarator that he was entitled to certain mails and duties. The Court dismissed the action, and found the defender entitled to expenses (*ante*, p. 736). The Auditor having taxed the defender's account of expenses, the pursuer lodged a note of objections to the report, in which he challenged certain items which had been allowed. The principal objections were (1) to the fee allowed to a London valuator, as to which objection was taken to the mode certification had been obtained as well as to the actual amount of the fee; (2) to the cost of printing, in respect that the proof and documents charged for were in a previous action, and had merely been adopted into this by agreement; (3) to consultation and debate fees allowed to counsel.

The following authorities were cited:—*Shaw & Shaw v. J. & T. Boyd, Limited*, 1907 S.C. 646, 44 S.L.R. 460; *Kay v. Wilson's Trustees*, May 25, 1850, 12 D. 941; *Gunn v. Muirhead*, October 19, 1899, 2 F. 10, 37 S.L.R. 9; *Lord Elphinstone v. Monkland Iron and Coal Company, Limited*, February 2, 1887, 14 R. 449, 24 S.L.R. 323.

At advising, the judgment of the Court (LORD JUSTICE-CLERK, LORD DUNDAS, and LORD SALVESEN) was delivered by

LORD SALVESEN—In this case various objections have been stated to the Auditor's report on the defender's account of expenses. Some of these raise questions of principle.

The first objection is of this nature. A valuator in London was adduced as a witness for the defender, the Lord Ordinary