judgment of the Sheriff is right, and that we must answer the question of law in the affirmative. That is my opinion, and I must say I have come to it without any hesitation.

I only desire to add that I am not prepared to assent entirely to all the findings which are contained in the general findings with which the learned Sheriff concludes his statement. I think that he has combined a variety of different reasons of different degrees of cogency that bear more or less directly upon the point in issue, whereas the true ground of judgment, I think, is that the appellant was doing something he was not employed to do, and thereby incurred danger which would not have been incurred in the work in which he was employed.

LORD DUNDAS—I entirely concur in all that your Lordship has said, and I do not think I could usefully add anything more.

LORD MACKENZIE—I am of the same opinion. When the boy met with this accident he was doing something which he was not employed to do as a message boy. The statement in finding 5 is quite distinct, that he pulled the rope and caused the hoist to ascend, and in finding 7 it is said that while the hoist was passing upwards he met with the accident. Therefore I think it is plain that the accident was due to nothing that happened during the course of his employment in delivering his message, but because he took upon himself to discharge the duties of the hoist man.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Watt, K.C.—J. A. Christie. Agents—St Clair Swanson & Manson, W.S.

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

Friday, May 26.

EXTRA DIVISION.

[Sheriff Court at Airdrie.

KELLY *v.* THE AUCHENLEA COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—*Injury by Accident—"Accident"—Pneumonia Caused by Inhalation of Poisonous Gas.*

A miner employed in a mine in the course of his work fired a shot of gunpowder, and about three minutes after the explosion returned to the working-place when it was still full of smoke. He subsequently died from pneumonia, caused by the inhalation of carbon monoxide gas generated by the explosion. It was found proved that this gas was generated by the combustion of gunpowder in varying proportions depending on the ventilation, that similar blasting operations were of daily occurrence, and that on previous occasions the deceased had suffered from headache and nausea caused by the gas. In a claim at the instance of the deceased's dependants, *held* that death resulted from an accident within the meaning of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1), enacts—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation. . . ."

Jane Brelsford or Kelly, wife of the deceased Robert Kelly, miner, Cleland, as an individual and as tutrix and administratrix-in-law for her pupil child Robert Kelly junior, and Nellie Kelly, a daughter of the said Robert Kelly by a previous marriage, claimed compensation under the Workmen's Compensation Act 1906 from the Auchenlea Coal Company, Limited, Howmuir Colliery, Cleland, in respect of the death of the said Robert Kelly. The Sheriff-Substitute (MILLAR CRAIG), acting as arbitrator, with the assistance of a medical assessor, having awarded compensation, a case for appeal was stated.

The following *facts* were admitted or proved—"1. That on 27th June 1910 the deceased Robert Kelly was working as a miner with his brother Patrick Kelly in the employment of the appellants in the lower Drumgray seam of the Howmuir Colliery, where he had worked since the end of March 1910. 2. That about 10 a.m. on that date, in the course of their work, the deceased and his brother 'fired a shot' of about ¾ lb. of gunpowder (the usual charge) in their working-place in the said colliery. 3. That having retired after preparing the shot they voluntarily returned to their working-place about three minutes after the explosion, when the working-place was still full of smoke. 4. That shortly thereafter both felt ill, the deceased being considerably worse than his brother. 5. That after working for about three-quarters of an hour, during which time they repaired the damage done by the explosion and filled and took out one hutch of coals, they decided to abandon work for the day as they were feeling too ill to continue. 6. That they accordingly proceeded to the pit bottom, but were not allowed to ascend the shaft by the pit bottomer, who believed that he was not entitled to allow them to do so before the end of the shift, without authority from the oversman or under manager. 7. That the deceased and his brother were thus kept waiting for about two hours and a half at the pit bottom, where they were exposed to cold and draught. 8. That on the two following days the deceased was still ill, but was able to be at work, and it was not proved that he put out less coal than usual. 9. That on the next day the pit was idle and the deceased was still ill, but was able to be out for a short time.

10. That on the following day (1st July) the deceased was suffering from acute lobar pneumonia. 11. That at 10·45 a.m. on 5th July 1910 the deceased died from pneumonia and heart failure. 12. That the combustion of gunpowder generates, *inter alia*, carbon monoxide gas in varying proportions depending on the ventilation. 13. That the ventilation in the place where the deceased was working on 27th June 1910 was fairly good and somewhat better than during the immediately preceding month of May. 14. That blasting operations in deceased's said working-place were of daily occurrence; that inhalation of the gases generated thereby frequently caused in the case of deceased and his brother pain in the head, giddiness, and inclination to vomit, but that these symptoms were more severe on said 27th June. 15. That pneumonia is not infrequently caused by carbon monoxide gas poisoning, but is more frequently due to other causes. 16. That the illness which the deceased felt shortly after resuming work after the explosion in his working-place on 27th June 1910, and from which he was still suffering on the following days, was caused by inhalation of carbon monoxide gas generated by the said explosion. 17. That the pneumonia from which the deceased died on 5th July 1910 was caused by inhalation of carbon monoxide gas generated by the said explosion. 18. That pneumonia might have been caused by the deceased's exposure to cold and draught at the pit bottom. 19. That the respondents Mrs Jane Brelsford or Kelly, widow of the deceased, Robert Kelly, posthumous child of the deceased, born on 27th August 1910, and Nellie Kelly, five years old, a child of the deceased by a previous marriage, were totally dependent on the earnings of the deceased at the time of his death. 20. That the earnings of the deceased in the employment of the appellants during the three years preceding the 27th June 1910 amounted to £221, 13s."

The Sheriff-Substitute further stated—"On these facts I found (1) that the death of the deceased Robert Kelly resulted from injury by accident arising out of and in the course of his employment with the appellants; (2) that the respondents were entitled to compensation from the appellants in terms of the Workmen's Compensation Act 1906. I assessed the same at £221, 13s., and allocated the same as follows—To Mrs Jane Brelsford or Kelly, £73, 13s.; to Robert Kelly, £84; to Nellie Kelly, £64; and I found the respondents entitled to expenses."

The *question of law* was—"Did the death of the deceased Robert Kelly result from injury by accident arising out of and in the course of his employment with the appellants?"

Argued for appellants—The man had died from disease and not from accident. The conditions which led to the man getting pneumonia were not created by accident. It was not an accident that he had inhaled the gas, because he had entered the place of the explosion deliberately, and the explosion itself had been deliberately created. The present case was in the same position as lead poisoning under the previous Act—*Steel* v. *Cammell, Laird, & Company, Limited*, [1905] 2 K.B. 232. *Brintons Limited* v. *Turvey*, [1905] A.C. 230, was the furthest that the Courts had gone in holding that the contraction of disease was an accident, and since then it had been expressly disclaimed that every disease contracted by a workman in the course of his employment was an accident—*Broderick* v. *The London County Council*, [1908] 2 K.B. 807. "Unexpected or fortuitous or unforeseen" must be elements present to constitute an accident—*Steel* v. *Cammell, Laird, & Company, Limited, cit. supra, per* Cozens-Hardy, M.R., p. 810—though this did not necessarily mean external injury—*Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443; *Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437. "Accident" connoted something different from disease—*Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677; *Coe* v. *Fife Coal Company, Limited*, 1909 S.C. 393, 46 S.L.R. 328. To decide that the present case was an accident would be to extend the definition to a very wide area.

Argued for respondents—It was not a uniform consequence of an explosion in the area in question that there would be a dangerous accumulation of gas. What had happened was that the workman had got an accidental inhalation of poisonous gas. This gas did not betray its presence, and even assuming means of detecting it, a mere error in judgment in entering the area too soon would not matter, more especially as death had followed. The accidental nature of the death was established by the fact that whether a lethal dose was present or not depended on a series of circumstances which the miner had no power of determining. These elements distinguished the case from those cited, where the disease was a foreseen consequence. On the authority of *Fenton* v. *Thorley & Company, Limited, cit. sup.*, the word "accident" must be taken in its popular sense.

At advising—

LORD KINNEAR—The question in this case is whether the death of the deceased Robert Kelly resulted from injury by accident arising out of and in the course of his employment with the appellants. That is primarily a question of fact, but when the facts have been ascertained there remains behind a question whether the cause of accident which the Sheriff-Substitute finds proved does or does not answer to the statutory description of injury by accident, and that is a question of legal construction which is proper for the courts of law, and accordingly we know that it is a question which has been very frequently considered both in this country and in England, and has been regarded, as I think it is in this case, as a question of some difficulty. The Lord President had occasion to observe in a very recent case (*Coe* v. *Fife Coal Company, Limited*, 1909 S.C. 393) in this Division that in the previous decisions he

could find no perfect definition of "accident" as that word is used in the statute, and probably that is not surprising, because it has been pointed out by a very high authority (Lord Macnaghten in *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443) that the Act of Parliament in that clause is using popular and ordinary language, and a perfect definition involves an exact accuracy of language which is more than ordinary popular usage will bear.

We have to consider, according to all the authorities, whether the thing which is said to have happened and to have caused injury would in ordinary language be called an accident or not. Now although there is no precise definition which we can apply as a criterion in deciding that question, there is a great deal of authority binding upon us and in itself extremely valuable for interpreting the word. In particular, I think we find sufficient authority in the case of *Fenton* v. *Thorley & Company*, [1903] A.C. 443, and of *Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437. The true effect and application of these cases is, I think, very well illustrated in two other cases cited to us decided in the Court of Appeal in England, where the Court reached a different result upon the question of fact, but upon a construction of the Act entirely in accordance with that of the House of Lords. I think that both in the cases where the workman's claim has been sustained, and in those where it has been rejected, a method of interpretation was adopted which we must take as our guide in the present case. In these cases it was held that whether the word "accident" was capable of accurate definition or not it implied something unexpected and undesigned, and also it implied some external act which could be the subject of a notice to the employer, because, whatever is doubtful about the intention of Parliament in using the phrase, it is certain that it did intend that notice should be given of the occurrence which was said to be an accident. Therefore you have to look for some external fact distinct from the idiopathic condition of the man himself which can be described as an unforeseen and undesigned occurrence causing injury to the workman. That being the question, a difficulty, and I think it is not a small difficulty, arises in applying the rule of interpretation to the particular facts of the case.

What happened, according to the Sheriff's finding, was that the deceased and his brother were working together as miners in a certain seam of the Howmuir Colliery, where they had worked since the end of March 1910; that about ten o'clock on the morning of 27th June 1910 the deceased and his brother fired a shot of about three-quarters of a pound of gunpowder (the usual charge) in their working-place in the colliery; that having retired after preparing the shot they voluntarily returned to their working-place about three minutes after the explosion, when the working-place was still full of smoke; that shortly thereafter both felt ill, the deceased being considerably worse than his brother. Without following in detail the whole history of the illness which the learned Sheriff gives, the result at which he arrives is that the man died after a short illness; that the direct cause of his death was pneumonia, and that the pneumonia was caused by the inhalation of carbon monoxide gas which was generated by the explosion. Then he says with reference to this cause of injury that the combustion of gunpowder generates carbon monoxide gas in varying proportions, depending on the ventilation, and therefore so far as the mere generation of this gas was concerned it could not be said that there was anything unusual or unexpected in its production by the combustion of gunpowder. But then the Sheriff-Substitute goes on to say that blasting operations of this kind were of daily occurrence, and that on previous occasions both the deceased and his brother had suffered from the effects of the gas thereby generated which produced in them headache and nausea. The blasting operations were of daily occurrence. They generate a certain amount of poisonous gas which had frequently produced headache and nausea in the deceased. But then he says also that the production of the gas occurs in varying proportions depending on the ventilation. It is a reasonable inference from that that the death of the workman by pneumonia is not a usual or ordinary occurrence from daily blastings of this kind. It is not suggested that it ever happened before. The man had suffered from headache and nausea before, but the result of the presence of noxious gas in such proportions as those in which it was present on ordinary occasions was not fatal to the workman, and on this occasion it was.

Now I think the question really arises whether there was anything that can in ordinary language be called an accident, not in the production of this poisonous gas alone, but in its generation in such quantities as to be fatal to the workman. In considering the law as it has been already laid down, and to which I have referred, I think the two cases that are most important to consider are *Fenton* and *Ismay*. In *Fenton* Lord Macnaghten puts it in this way. He first quotes what Lord Halsbury had said in a different case referring to a different kind of accident, but still requiring the word "accident" to be defined, viz. — "I think the idea of something fortuitous and something unexpected is involved in both words 'peril' and 'accident,'" and after saying that he can take no objection to that expression he goes on —"I come therefore 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 untoward event which is not expected or designed." Then in *Ismay* the Lord Chancellor (Lord Loreburn) says — "In my view this man died from an accident. What killed him was a heat stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual

effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience in this instance had not taught. It was an unlooked-for mishap in the course of his employment. In common language it was a case of accidental death."

Now I see nothing in the cases of industrial disease which were quoted to us to create any difficulty in the application of the doctrine so laid down. In the case of *Steel* v. *Cammell, Laird, & Company, Limited* [1905], 2 K.B. 232, it was held that a man whose work required him to be constantly handling red and white lead, and who contracted a disease from the poisonous effects of continuously handling the lead, had died of the disease and not of an accident. But then that was because there was nothing unforeseen or undesigned, and no particular event of the occurrence of which notice could be given on the man's death from the disease. The material facts as proved were that lead poisoning was an ordinary anticipated result of continuous handling of red and white lead; that the development of the disease was very gradual; that the poisoning could not be traced to any particular day, but was the result of an accumulation of poisoning extending over a period of time. The Court there held that the workman died of what was undoubtedly an industrial disease arising out of and in the course of the man's employment, but which could not be described as an unforeseen accident, and they were affirmed in that view by the provision of the Act of 1906 that certain diseases from which a workman may suffer are to be treated not as accidents but as if they were accidents, and the rate of compensation in these cases is made to depend upon the direct enactment of the statute, and not upon the general clauses by which the employer is liable in compensation for accidents. The case of *Broderick* v. *London County Council*, [1908] 2 K.B. 807, in which a man suffered from the continual inhalation of sewer gas, was exactly of the same kind. Therefore, taking the whole four cases together, I think what we have got to inquire is whether there was any element of the unforeseen or the unexpected in the occurrence of the event which caused the injury on the facts as stated by the learned Sheriff. I think there was evidence before the Sheriff on which he might so hold. As I understand his statement, he considers that the cause of death was carbon monoxide gas, that this is not a constant element in the products of the combustion of gunpowder in such proportions as to be fatal to life, and that its unexplained presence in such fatal proportions on the occasion in question was, in the ordinary sense of the word, an accident. I do not think that all this was the only possible inference, but it is an inference which might reasonably be drawn, and if the Sheriff thought that it ought to be drawn in fact, I see no ground in law for disturbing his decision.

I am therefore of opinion that we should answer the question put to us in the affirmative.

Lord Dundas — I am of the same opinion. When one looks at the form of the question put to us, one observes that the word to be particularly emphasised and paid attention to is the word "accident." What we have really to decide is whether or not this unfortunate man's death was the result of an accident within the fair meaning of the Act and of the word itself. I think the answer must be in affirmative. I had at first some little doubt as to the proper construction to be put upon some of the findings of the Sheriff-Substitute, but having read them with care, I think they warrant the conclusion that the facts proved in relation to what occurred on 27th June 1910 disclose circumstances of an unusual and abnormal character, and not such as could be foreseen. Agreeing therefore with all that your Lordship has said, I think that the result reached by the Sheriff-Substitute was right, and that the question must be answered accordingly.

Lord Mackenzie — I am of the same opinion. The question in the case is whether the Sheriff-Substitute could reasonably reach the conclusion he did on the facts which he found, and, put in popular language, that just means this, did an accident happen in this pit on 27th June. Now when one considers that the deceased had been working in this pit for a period of nearly three months from the end of March down to 27th June, engaged on exactly the same work, and that that work—although it produced certain inconvenience and sickness—had not, so far as appears in the case, caused the man to stop work during the whole period of three months, one naturally starts with the suspicion that there must have been some unusual occurrence on 27th June to account for what happened on that day. All the conditions were the same with the exception of the one which is dealt with in the twelfth finding of fact. Now it is quite plain that when this particular shot was fired the symptoms which ultimately ended in death became almost immediately felt, because not only was the deceased but also his brother affected with illness. The deceased never recovered from that illness. It continued for a few days, and he died on 5th July. The Sheriff-Substitute has found that the illness, pneumonia, which supervened almost immediately after the occurrence, was caused by the inhalation of carbon monoxide gas generated by the firing of the shot. In these circumstances was the deceased accidentally poisoned on the 27th June by carbon monoxide gas? The Sheriff-Substitute has found that he was, and that therefore there was an injury by accident arising out of and in the course of his employment. The justification for that conclusion, I think, is to be found in a consideration of the twelfth finding in fact, which is to the effect that this gas which is generated by the combus-

tion of gunpowder is generated in varying proportions. It was generated, no doubt, on each day during the three months he had been working, but on none of these previous occasions had there been what one might describe as a lethal dose. There was a lethal dose according to the findings on 27th June, and therefore I consider that the Sheriff-Substitute was justified in coming to the conclusion which he did.

The Court answered the question of law in the affirmative.

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

Counsel for Respondents — Constable, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Tuesday, May 30.

SECOND DIVISION.

HAY AND OTHERS (OWNERS OF S.S. "THE COUNTESS") *v.* JACKSON & COMPANY (FOR OWNERS OF CARGO ON S.S. "PHŒNICIA").

Ship—Collision—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504—*Limitation of Liability -Petition for Limitation in Scotland when Collision in England, Claimants there, Writs Issued there, and Witnesses there—Competency—Forum non conveniens.*

The owners of "The Countess," registered in Scotland, presented a petition under sections 503 and 504 of the Merchant Shipping Act 1894 for stay of actions and limitation and distribution of liability in respect of a collision in English territorial waters with the "Phœnicia," registered in England. Answers were lodged by the owners of the cargo on board the "Phœnicia," who opposed the petition on the ground of incompetency, and also pleaded *forum non conveniens.* The respondents averred that they and the owners of the "Phœnicia" had issued writs in the English Courts against the petitioners prior to the presentation of the petition, and that the witnesses required in proof of their claim were resident in England. *Held*, the competency being admitted by the respondents, that the plea of *forum non conveniens* fell to be repelled.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) enacts, section 503—"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say) . . . (*d*) Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship; . . . be liable to damages beyond the following amounts; (that is to say) . . . (ii) In respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.' Section 504—'Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session . . . and that Court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner, and subject to such regulations, as to making the persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

John Hay and others, the registered owners of s.s. "The Countess," *petitioners*, presented a petition for stay of actions and limitation and distribution of liability. Answers were lodged for Andrew M. Jackson & Company, *respondents*, as representing the owners of the cargo on board the "Phœnicia."

The petitioners averred—"That the petitioners are the registered owners of the steamship 'The Countess.' of Glasgow, which steamer is of the net register tonnage of 234·74 tons, and her engine space is 323·79 tons, making a total tonnage for the purposes of this petition of 558·53 tons. . . . That on or about 4th March 1911, while 'The Countess' was proceeding on a voyage from Granville to Lydney, in the Bristol Channel, she came into collision with the steamship 'Phœnicia,' of Whitby, with the result that both steamers were damaged. No loss of life or personal injury were caused by the said collision. . . . That the said collision occurred, and the resulting damage was occasioned, without the actual fault or privity of the petitioners, and their liability, which is admitted, for damage caused by the said collision is limited to £8 per ton on said 558·53 tons or £4468, 4s. 10d., in respect of damage to vessels, goods, merchandise, or other things, other than damage for loss of life or personal injury.

"That claims have been intimated on behalf of the International Line S.S. Company, Limited, c/o C. Marwood, shipowner, Whitby, the owners of the s.s. 'Phœnicia,' for whom Messrs Thomas Cooper & Company, solicitors, London, act, and by the owners of the cargo on board the 'Phœnicia,' whose names have not yet been disclosed, but for whom Messrs Andrew M. Jackson & Company, solicitors, Hull, are acting, for payment of sums which together amount to considerably in excess of £8 per ton as above mentioned. Other