that the amount of her husband's indebtedness as at the time of her father's death should form a deduction from her share of his means. Whether that is regarded as an assignation or not, it is, at all events, a mandate to his trustees to retain her share in liquidation of this indebtedness. It requires no personal action against her to make this mandate effective, because the trustees are already in possession of the funds, and it appears to me to be very much in the same position as a pledge by a lady of her jewels to a creditor of her husband, or a conveyance of her separate estate to such a creditor. Transactions of this kind were held to be unchallengeable by the wife more than two centuries ago, when the law with regard to a married woman's personal obligations was rigidly applied—*Ellis* v. *Keith*, M. 5987; *Marshall*, M. 5990. I cannot differentiate this case from these or from the later case of *The Reliance Mutual Life Assurance Society*, 18 R. 615.

Another argument addressed to us on behalf of the pursuer was that the subject assigned being a *spes successionis*, which is not property, could not be validly conveyed by a married woman; that in fact it conveyed nothing, inasmuch as the granter had nothing to convey, and in the words of Lord Rutherfurd Clark in *Reid* v. *Morrison*, 20 R. 510, "it becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest." It was maintained upon these words that the document founded on was, at most, a mere obligation to convey the pursuer's share of her father's estate, and as such was of the nature of a personal obligation.

I do not think any such conclusion is to be drawn from the words which I have read. I am not sure that the word "accretion" used by that very eminent Judge was a happy one; but all that it imports is that the conveyance cannot take effect until the subject vests. At any rate I see no warrant for the distinction that is sought to be drawn between an assignation of property in security of a husband's debt and an assignation of a chance that the assignor may become the proprietor of the subject assigned. It being perfectly clear that a *spes successionis* is assignable, I see no reason for inferring that a married woman is under a greater disability of dealing with her hopes of succession than with the succession itself when it has vested in her. I think therefore we must repel the second plea-in-law for the pursuer.

The third and fourth pleas are based on very meagre averments. The pursuer says that at the time of granting the document of 10th June she was in ignorance of her legal rights in her father's estate, that she had no independent legal advice, and that she received no consideration in exchange for signing the document. Further, she understood from her father that her share of his means and estate would be largely in excess of all sums advanced by him to her husband. In my opinion these averments are irrelevant to support a reduction of the document. There is no statement of what her ignorance consisted in. She does not say that but for this ignorance she would not have signed the document in question. nor is there any statement that she was induced to sign under error induced by misrepresentation; for even if the pursuer's father told her that her share of his means would be in excess of the sums that he had already advanced, that statement may have been perfectly accurate when it was made. I therefore agree with the Lord Ordinary in repelling the third and fourth pleas in law for the pursuer, and also in his conclusion that the defenders fall to be assoilzied.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Pursuer (Reclaimer) — M'Lennan, K.C.—Dykes. Agent—Wm. B. Rainnie, S.S.C.

Counsel for Defenders (Respondents)—Chree—Carmont. Agents—Lindsay, Cook, & Dickson, Solicitors.

Saturday, December 23.

FIRST DIVISION.

[Sheriff Court at Hawick.

ROBSON, ECKFORD, & COMPANY, LIMITED *v.* BLAKEY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising out of the Employment—Heat Apoplexy.*

A plumber, who was in a state of impaired vitality at the time, was engaged on an excessively hot day in July in laying and jointing pipes in a trench cut in a road. His work obliged him to stoop to a considerable extent, and while so engaged he was struck down by heat apoplexy, from the effects of which he subsequently died. *Held* that his death was not due to an accident arising out of his employment in the sense of section 1 (1) of the Workmen's Compensation Act 1906.

Mrs Mary Blakey, Hawick, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from Robson, Eckford, & Company, Limited, contractors, Hawick, in respect of the death of her husband, the matter was referred to the arbitration of the Sheriff-Substitute at Hawick (BAILLIE), who found the pursuer entitled to compensation, and at the request of the defenders stated a Case for appeal.

The *facts* were as follows:—"1. The deceased Joseph Blakey, a plumber in the employment of the defenders, was engaged

along with other workmen in their employment, in July 1911, in laying and jointing iron pipes in a trench cut in a road at Gateshead.

"2. That said iron pipes were 9 feet long by 5½ inches in diameter, and were jointed with lead. The pipes were laid along the side of the trench, and three lengths requiring two joints were jointed outside the trench, after which the resultant length of 27 feet of pipe was laid in the trench, and a joint made inside the trench with the pipe already there. The trench was on an average 2 feet 6 inches deep, and as the trench was dug the pipes were put in. This jointing of the pipes was the special employment of the deceased, but he was also employed in laying the pipes in the trench and guiding them into pipes already there.

"3. The jointing was performed by first plugging the joint with yarn round the inner pipe, then forming a clay mould round the joint, after which molten lead, melted in a chafer and transported in a ladle, was poured in and the clay mould removed, and the lead then staved or hammered into the joint. Each jointing took, in the present case, about fifteen minutes, including the time occupied in going to and from the chafer. About four minutes only were occupied in dealing with the molten lead, of which about 3 lbs. was required for each joint. On the day in question the deceased had made about six joints. The process described is the usual mode of jointing pipes. Both when laying and guiding the pipes, and also when jointing them, the deceased was obliged to stoop to a considerable extent over his work.

"4. That on 26th July 1911, at about 9 a.m., while engaged inside the trench in guiding a length of jointed pipe into another pipe there, the deceased was seized with a sudden attack of illness, but after going to town and taking some stimulant, returned to his work. At or about 11 a.m. that day, while carrying the ladle containing about 3 lbs. of molten lead from the chafer to the trench, he had another similar seizure and fell to the ground, after which seizure he left his work. Late that night and early next morning fresh attacks of his illness occurred, and he was sent home to Hawick, when he was found to be suffering from heat apoplexy. He remained there totally incapacitated and under medical treatment till his death on 1st August 1911.

"5. That the deceased had been engaged at his said employment for about a fortnight before 26th July 1911. Considerable heat prevailed on that date, and for some time before and after, and the stooping position in which the deceased was obliged to work caused the heat to have a special effect on him, which it did not have on persons working in a more upright position, though he had not made any complaints. The deceased was in a state of impaired vitality at the time, partly owing to over indulgence in alcohol and partly owing to his having been out of work for about six months before being employed by the defenders. It was not proved that the use of molten lead caused or contributed to the deceased's injury, or had any appreciable effect in aggravating the excessive heat of the sun. It was proved that it melts at a low temperature, gives off little heat, and was used in small quantities on this job.

"6. That the cause of the death was heat apoplexy, and this heat apoplexy was caused by the excessive atmospheric heat on said 26th day of July 1911 acting on his impaired vitality, aggravated by the stooping position in which he was obliged to work."

The Sheriff-Substitute further stated—"On the above facts I found that the death of the said Joseph Blakey was the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906."

The *questions of law* were—"(1) Whether the personal injury to the deceased was caused by 'an accident' within the meaning of the Workmen's Compensation Act 1906? (2) If the previous question be answered in the affirmative, whether the accident arose out of the deceased's employment within the meaning of the Workmen's Compensation Act 1906?"

Argued for the appellants—The injury in the present case (1) was not an accident, or (2) if it was an accident it did not arise out of the employment. It arose from a natural cause to which everyone was subject, and was similar to the frost-bite in *Warner* v. *Couchman*, [1911] 1 K.B. 351, *per* Cozens-Hardy, M.R, at p. 353, *aff.* 28 T.L.R. 58. To make it an accident there must be something in the employment which materially aggravated the natural risk, *e.g.*, artificial heat, as in *Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437; or the reflected heat of the sun, as in *Morgan* v. *Owners of s.s.* "*Zenaida*," 1909, 25 T.L.R. 446. There must also be the element of unexpectedness — *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443, *per* Lord Macnaghten at p. 448. In the present case there was no finding in fact that this was an accident, and the cause of the illness was one which was common to everyone. The finding as to stooping did not make any difference, and did not make it an accident arising out of the employment. There were really two classes of cases on the decisions, viz., (1) Where the workman was placed in a position of danger; and (2) where the accident was due to the work which he was doing. The present case fell under neither class—*Brintons Limited* v. *Turvey* (the anthrax case), [1905] A.C. 230; *Wicks* v. *Dowell & Company, Limited* (epileptic fit and fall), [1905] 2 K.B. 225; *Broderick* v. *London County Council* (sewage gas), [1908] 2 K.B. 807; *Coe* v. *Fife Coal Company, Limited* (cardiac breakdown), 1909 S.C. 393, 46 S.L.R. 328; *Clover, Clayton, & Company* v. *Hughes*, [1910] A.C. 242; *Refuge Assurance Company, Limited* v. *Millar*, November 1, 1911, 49 S.L.R. 67.

Argued for the respondent—The present case was an accident within the authorities and within the definition of Lord Macnaghten in *Fenton* v. *Thorley & Company, Limited, cit. sup.* The heat-stroke in the present case was similar to the heat-stroke in *Ismay, Imrie, & Company* v. *Williamson, cit. sup.*, and in *Morgan* v. *Owners of s.s. "Zenaida," cit. sup.* It was, further, in the same class of cases as lightning in *Andrew* v. *Failsworth Industrial Society, Limited*, [1904] 2 K.B. 32. *Kelly* v. *Kerry County Council*, 1908, 42 Ir. L.T. 23, and 1 Butterworth's Workmen's Compensation Cases, 194, where death by lightning was held not to be an accident, was different. Similar cases were *Warner* v. *Couchman, cit. sup.*; *Stewart* v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 81; *Sheeran* v. *F. & J. Clayton & Company, Limited*, 1909, 44 Ir. L.T. 52, and 3 Butterworth's Workmen's Compensation Cases, 583; *Kelly* v. *Auchinlea Coal Company, Limited*, 1911 S.C. 864, 48 S.L.R. 768. Further, the accident arose out of the workman's employment because of the stooping position which it obliged him to maintain.

At advising—

LORD PRESIDENT—This is the case of a man who went out, in the course of his ordinary work, on a somewhat hot summer's day in Scotland, and bent over his work during part of the time he was engaged upon it, and consequently got his back heated. Being in a poor state of health he succumbed some days afterwards to an attack of apoplexy. Now if, in the early days of judicial interpretation of the statutes dealing with workmen's compensation, anyone had stated these facts and argued upon them that the man had met with an accident arising out of and in the course of his employment, I think the Court would have replied by a somewhat surprised negative. And yet I quite admit that upon the decided cases there has been a fairly formidable argument presented in favour of saying that this is an accident arising out of the employment. In the case of *Coe* I pointed out how one decision drove to another, in an observation which was afterwards approved of by more than one of their Lordships in the House of Lords; and I would like to add this, that there is danger of confounding the illustration of the principle with the principle itself.

Now I am very clearly of opinion in this case that there is really no evidence upon which you could say that the man met with an accident arising out of his employment. Various cases were cited to us. I do not propose to go through them all, but I shall mention those on which most reliance is placed, and those to which exception falls to be taken.

I think there is considerable help to be got from the two lightning cases. In one a rural labourer was struck by lightning. It was held that that was not an accident arising out of his employment, because his employment had not exposed him to any other danger than was common to every inhabitant of the British Islands who was at that moment within the area of the storm. On the other hand, in the other case a man was employed on a very high scaffold and was struck by lightning, and it was held that he had met with an accident arising out of his employment, because there was scientific testimony to the effect that if a person was put at a very great height from the ground he was very much more liable to be struck by lightning than people following their avocations on the ground. These are cases of the no doubt unexpected occurrence of a lightning flash; but when we come nearer the accident here—I mean in the quality of the injury—of course the two cases quoted to us were the well-known case of heat-stroke, in the House of Lords, and then the case, not reported in the regular reports, of *Morgan* v. "*Zenaida*," where the Court of Appeal held that a man on board the "Zenaida" who died of sunstroke had met with an accident arising out of his employment. I think both of these cases are very easily distinguishable. In the case of heat-stroke, in the House of Lords, though there was a most emphatic dissent from one of their Lordships, it was held that there had been an accident, because the man had been exposed to the action of heat which brought on heat-stroke by being obliged in the course of his employment, which was that of a trimmer, to stay in the stoke-hold. Other people who were not in the stoke-hold had no risk of that particular danger. The other case of the "*Zenaida*" I think may be explained in the same way. There the man was slung upon a scaffold in the tropics against the hull of the ship to do some painting, and there he got sunstroke. I am bound to say, if I agree with that case at all, it is only upon the ground that the peculiar position in which he was put, put him, so to speak, under a burning-glass and exposed him to a greater heat from the necessities of his occupation than other people were exposed to. If that is the true view of the case—and I think I am entitled to take it that it is the true view—then it is exactly in line with the case of heat-stroke in the stoke-hold.

But when you come to this case there is nothing of that sort. The only two things that can be said about this man's employment are, first, that he was in the open air, and therefore was more exposed to the sun than somebody who sat in a cellar, and secondly, that at his work he had to bend. Now since the days when Adam was expelled from Eden I think every outdoor labourer has had to bend at his work, and I think it would be the very climax of absurdity to say that because a man had to go into the open air, and because he had to stoop, he was exposed to a peculiar danger because of his employment. I think you reach the same result by putting the matter interrogatively. Before any accident has happened, ask yourself the question, To what class of dangers does this man's employment expose him? The answer is very obvious in most cases. Sup-

pose he is a collier, I may say his employment exposes him to the risk of having things falling upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exists only for people who go down into mines. I put in debate, I think, the illustration of the sandwichman who goes about the streets all day, and, mercifully for the other pedestrians, is not allowed to go on the pavements; and he is exposed on the streets to the danger of being run over by wheeled traffic. But if you had asked this, what are the special dangers incidental to the employment of a plumber who occasionally has outdoor work, nobody in their senses would have said, "Oh, heat apoplexy"; and when you come to the cause of heat apoplexy you come to the circumstances here, and I should say the *causa causans* was much more the man's own drinking habits than the sun on that particular day. There was an attempt to base an argument on the Sheriff's use of the words "excessive heat." Excessive heat is no standard. He only says it was in July 1911. We all know that July 1911 was a hot month; but to say that anyone who works, as it has been called, "Neath the baleful star of Sirius" is necessarily exposed to an excessive or peculiar danger, is a proposition which has no foundation.

On the whole matter I am very clearly of opinion here that there was no ground upon which this workman ought to have been awarded compensation. I think this case is very analogous to the case of *Warner* v. *Couchman* ([1911] 1 K.B. 351), and that one's whole opinion is very well summed up in the words in which the reporter has rubricked that case. It is this—that even assuming that there had been an accident, there was no peculiar danger to which the applicant had been exposed beyond that to which other persons engaged in outdoor work on that day had been exposed, and consequently that the accident had not arisen out of his employment.

LORD KINNEAR—I agree, for the reasons which your Lordship has given, and which I do not repeat. I only say in a word that I do not think that this man was exposed by his employment to any special risk to which other people were not liable, provided they happened to be working in the open air on the 26th July 1911. The only special circumstances which the Sheriff's statement of facts adds to that which I have mentioned is that the man, owing to his own habits, was in a state of impaired vitality at the time; and accordingly the Sheriff thinks that the danger of working in unusual heat was aggravated by his own physiological condition; but that is not an exceptional circumstance incident to the employment, but incident to the person. I therefore agree with your Lordship.

LORD MACKENZIE—I agree.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

". . . Answer the questions stated by declaring that the injury to the deceased Joseph Blakey was not an accident within the meaning of the Workmen's Compensation Act 1906, arising out of his employment: Therefore reverse the determination of the Sheriff-Substitute as arbitrator, and remit to him to dismiss the claim."

Counsel for Appellants—Morison, K.C. —W. J. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—D. Anderson—Steedman. Agents—Steedman, Ramage, & Co., S.S.C.

Wednesday, December 20.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

HORSBURGH *v.* THOMSON'S EXECUTORS AND OTHERS.

Fraud—Facility and Circumvention—Will—Reduction—Averments—Relevancy.

Circumstances in which *held* that a bare averment that A had impetrated a will, taken in conjunction with the "setting" in which it appeared, which included relevant averments of the testator's weakness and facility, and of A's great influence over him, was relevant to support an issue of facility and circumvention.

On 24th July 1911 Amelia Taylor Horsburgh, residing at Lochtyknowe, Carnoustie, *pursuer*, brought an action against (1) John Thomson, potato merchant, then residing in London, and others, executors of the late John Thomson, 11 Nethergate, Dundee; (2) the said John Thomson as an individual; (3) Mrs Isabella Thomson or Campbell, widow, 11 Nethergate, Dundee; (4) Mrs Jane Thomson or Watson, wife of and residing with Frank Watson at Rosemount, Carnoustie, and the said Frank Watson as curator and administrator-at-law for his said wife, *defenders*, for reduction of (*first*) the last will and testament of the said John Thomson, dated 25th February 1896, *quoad* a pretended deletion on the first page thereof of a clause containing these words—"In the event of any of them dying, their share to be divided to their children," and a pretended withdrawal of the clause by a marginal addition in the following terms—"I withdraw this.—J. Thomson"; (*second*) a pretended codicil dated 19th January 1901; (*third*) a second pretended codicil dated 1st October 1907; and (*fourth*) a third pretended codicil, undated, and containing these words—"Bella is get the ground in the Western Cemetery."

The pursuer averred—"(Cond. 1) The deceased John Thomson, of 11 Nethergate, Dundee, died on 30th March 1911, being then not less than 93 years of age. He left a last will and testament dated 25th February 1896, whereby he appointed the defenders John Thomson and Frank Wat-