properly man, equip, and supply the ship." Unless the sub-section is so read there is no standard of what constitutes "proper manning, equipment," and so on. The obligation in that case is an absolute one, and rightly so, because there is no difficulty in the shipowner ascertaining what is the proper crew to man his ship, or the equipment and supplies which are required that she may be seaworthy for the contemplated voyage. The other obligation is merely one of due diligence, for a defect constituting unseaworthiness may be latent and not capable of being discovered by ordinary care and vigilance. So read, the sub-section as a whole is perfectly reasonable and is in a line with the Harter Act, on which no doubt it was largely modelled. On the other view there would be an absolute obligation imposed upon the shipowner of keeping the ship seaworthy even when she had been injured on a voyage and could not be repaired while the voyage lasted, and any qualification of this absolute obligation in the bill of lading would be a penal offence. The common law obligation in such a case is just what is expressed in the clause, namely, that due diligence must be exercised to keep the ship seaworthy, but the common law is not so unreasonable as to exact performance of what may be impossible. On these grounds I have reached the same conclusion as the Sheriff, and I think we should adhere to the interlocutor appealed from.

LORD GUTHRIE—I concur with your Lordship in the chair.

The LORD JUSTICE-CLERK was absent.

The Court affirmed the interlocutor of the Sheriff.

Counsel for the Pursuers and Appellants—Clyde, K.C.—Hon. W. Watson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Constable, K.C—Stevenson. Agent—Campbell Faill, S.S.C.

Saturday, December 7.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Perth.

DOUGALL *v.* CALEDONIAN RAILWAY COMPANY.

Process—Record—Amendment—Failure to Pay Opponent's Expenses—Absolvitor.

In an action of damages for personal injury brought in the Sheriff Court at Perth and remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), the Court on 15th November 1912 allowed the pursuer to amend his record, found the defenders entitled to the expenses connected with the amendment, and allowed the pursuer "to proceed in the cause only on payment" of the expenses found due. The pursuer having subsequently intimated that he did not intend to pay the expenses and proceed in the cause, the defenders moved for absolvitor. The pursuer maintained that the appropriate decree was one of dismissal.

On 7th December 1912 the Court, without opinions, pronounced this interlocutor—"In respect that the order as to expenses contained in the interlocutor of 15th November last has not been obtempered, assoilzie the defenders from the conclusions of the summons and decern."

Counsel for the Pursuer—D. Anderson. Agents—J. Miller Thomson & Company, W.S.

Counsel for the Defenders — Wark. Agents—Hope, Todd, & Kirk, W.S.

Saturday, December 7.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'MILLAN *v.* THE SINGER SEWING MACHINE COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII cap.* 58), *sec.* 1 —"*Accident*"—*Chill Followed by Pleurisy—Averments—Relevancy.*

In an application under the Workmen's Compensation Act 1906 the claimant, a collector and canvasser, averred that while collecting accounts in certain tenements he over-exerted himself climbing stairs and became sweated, with the result that he contracted a chill which developed into pleurisy, thereby sustaining an accident within the meaning of the Act. The arbiter having dismissed the application as irrelevant, a case for appeal was stated.

Held that the arbiter was right and appeal *dismissed.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between William M'Millan, canvasser, Glasgow, *appellant*, and the Singer Sewing Machine Company, Limited, *respondents*, the Sheriff-Substitute (GLEGG) dismissed the application as irrelevant, and at the claimant's request stated a Case for appeal.

The Case stated—"At the calling of this case the appellant was appointed to lodge a condescendence, and the respondents' answers and said papers were duly lodged in process. The condescendence lodged by the appellant is in the following terms:—'1. The pursuer is a collector and canvasser, and resides at 44 Phœnix Park Terrace, off Garscube Road, Glasgow. The defenders are a limited liability company, and carry on business at 58 Bothwell Street, Glasgow. 2. The pursuer entered the defenders' employment as a collector and canvasser on or about the 15th day of February 1912, at a salary of 10s. per week and commission,

made up of (1) 5 per cent. on sums collected, and (2) 10 per cent. on goods sold. The said salary of 10s. per week was increased to £1 per week in or about the middle of March 1912. 3. On or about Monday, the 6th day of May 1912, the pursuer was engaged in the ordinary course of his employment as canvasser and collector with defenders in canvassing and collecting accounts from defenders' customers in the Maryhill and Lambhill districts of Glasgow and neighbourhood thereof. The weather was quite dry all day. Pursuer was engaged up till about eight o'clock on the evening in question, when he found that it would be necessary for him to tax his energies to the utmost in order to enable him timeously to overcome the work before him, and the pursuer had to complete said work in the evening of said Monday, 6th May, as it was his duty and instructions to do so. 4. The last calls of the pursuer consisted of calls on a number of customers of defenders for the collection of accounts in three different tenements in Maryhill, viz.—(1) Mrs Thomson, 173 Cumlodden Drive; (2) Mrs Gibbin, 7 Morrison Street; and (3) Mrs Crossan, 9 Morrison Street. The pursuer had called at said tenements earlier in the day, but none of said customers were at home, and accordingly on the evening of said 6th May 1912, and about eight o'clock, the pursuer proceeded to call at the house of the said Mrs Thomson. The said Mrs Thomson resided in a flat in said tenement, three stairs up. While walking up said stairs the pursuer over-exerted himself and became sweated, with the result that he contracted a chill. He completed his other two calls on Mrs Gibbin and Mrs Crossan, but on arriving home he had to go immediately to bed. 5. As a result of having contracted said chill he was confined to bed from 6th to 14th May 1912, on which latter date he was taken to the Royal Infirmary, Glasgow, where it was found that he was suffering from pleurisy as a consequence of said chill, and he has since said 6th May been incapacitated from resuming his occupation. 6. Said chill contracted by the pursuer was an accident within the meaning of 'The Workmen's Compensation Act 1906,' and arose out of and in the course of pursuer's employment as a collector and canvasser foresaid with defenders. 7. The pursuer's earnings consisted of (1) salary at the rate of £1 per week, and (2) commission foresaid, averaging 8s. per week. The pursuer is therefore entitled to an award of compensation at the rate of 14s. per week during his period of incapacity. 8. Notice of said accident was given by the pursuer to defenders, and a claim for compensation made, but the defenders decline or delay to make compensation, and these proceedings have thus been rendered necessary.

"*Plea-in-Law.*—The pursuer being a workman in the employment of the defenders, and having sustained an injury by accident arising out of and in the course of his employment, is entitled to compensation under the Act founded on; and the sum sued for in name of compensation being reasonable, decree therefor ought to be granted as craved, with expenses.'

"The case was thereupon sent to the debate roll, and on this date I heard parties' procurators on the relevancy of the appellant's averments, when I found that the appellant had failed to make a relevant statement that (1) there was an accident within the meaning of the Workmen's Compensation Act, and (2) assuming there was an accident, said accident arose out of the appellant's employment.

"I therefore dismissed the application, and found the respondents entitled to expenses."

The *question of law* was—"Whether on the facts condescended on the arbiter was right in dismissing the application as irrelevant?"

Argued for appellant—There was no doubt that the injury, viz., the sudden chill and consequent pleurisy, arose "out of" the appellant's employment—*Millar* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, 49 S.L.R. 67; *Kitchenham* v. *Owners of s.s. "Johannesburg,"* [1911] 1 K.B. 523. It was also an "accident" within the meaning of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), for the passage of a disease germ into the body was an accident in the sense of the statute—*Brintons Limited* v. *Turvey*, [1905] A.C. 230. It was a "physiological injury," just as much as a "strain" or a "rupture," or the "inhaling of poisonous gas," and these had been held to be accidents—*Stewart* v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80; *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443; *Kelly* v. *Auchenlea Coal Company, Limited*, 1911 S.C. 864, 48 S.L.R. 768. When a workman sustained a physiological injury as a direct result of the work he was engaged upon, and in the reasonable performance of his duties, he met with "an injury by accident" within the meaning of the Act—*Warner* v. *Couchman*, [1911] 1 K.B. 351, *per* Fletcher Moulton, L.J., at p. 356. The cases of *Steel* v. *Cammel, Laird, & Company, Limited*, [1905] 2 K.B. 232; *Broderick* v. *The London County Council*, [1908] 2 K.B. 807; and *Eke* v. *Hart Dyke*, [1910] 2 K.B. 677, were not inconsistent with the appellant's contention, for in these cases it was not known, as it was here, what was the precise time, place, and circumstance in which the accident occurred. The cases of *Blakey* v. *Robson, Eckford, & Company, Limited*, 1912 S.C. 334, 49 S.L.R. 254; and the two lightning cases, viz., *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K.B. 32, and *Kelly* v. *Kerry County Council*, 1 Butterworth 194, were distinguishable, for what was there questioned was not the occurrence of an "accident," but whether the accident, which was assumed, had arisen "out of" the employment.

Counsel for the respondents were not called upon.

LORD PRESIDENT—I had occasion some time ago, I might almost say, to complain of the way in which, by the use o.

decided cases, we are, so to speak, driven from point to point and made to arrive at a result very far distant from the point at which we started, and I confess that I think this case is a very flagrant example of that. It is really almost painful to see to what a pitch of extravagance we are asked to go as the result of what, I must admit, seems to be quite reasonable argument upon the authorities.

Looking at this as a plain man, I think that nothing could be further removed from an accident than what happened in this case. All that the claimant can say is that in the course of his ordinary work he got overheated—he got, as he puts it, sweated—and that when he got home he felt he had contracted a chill, and afterwards found he was suffering from pleurisy.

I must say that until I am compelled to say so by a higher tribunal I shall never admit that such a thing as this is an accident. We were very strongly urged by the learned counsel who pleaded the case to allow a proof. I do not think we should, because a proof would come to nothing. He cannot ask that he should be better treated than by supposing he has proved every word which he has set forth; and if he had it would amount to no more than what I have said. But in case the matter should go further, I think it necessary to say that I think an arbitrator in Scotland is entitled in the conduct of the arbitration to take the procedure to which we are accustomed in Scotland—I mean the procedure which requires consideration of the question of relevancy before proof is allowed. I think it necessary to say so, because that is not the procedure in England. As we all know, the practical use of demurrer has long ago ceased. Everything goes to what is called trial, and relevancy is taken up along with the inquiry into facts. This is not our practice, and there is no reason why we should alter our practice.

Accordingly I think that this arbitrator, if he was clearly of opinion that the case as stated was irrelevant, was not bound to order a proof, and that we should not order him now to allow it. Assuming that the appellant, as I have just said, had proved everything which is stated in the case, it seems to me that there is no averment of accident.

It would be quite useless to go through the various cases. I would only say, with great respect, that I for my part entirely agree with the general review of the cases that was given by the Court of Appeal in England in the case of *Eke* v. *Hart Dyke* ([1910] 2 K.B. 677). And I notice that in that case Lord Justice Kennedy particularly scouts the idea of the case of a man catching cold being said to be an accident. Well, I cannot see the distinction between catching a cold which passes off, and catching a cold which eventually develops into pleurisy. Upon the whole matter I am of opinion that we should answer the question in the affirmative.

LORD KINNEAR—I agree.

LORD MACKENZIE—I am of the same opinion. I think this is a very plain case. I would only add to what your Lordship has said on the relevancy that there was no suggestion in the argument that the learned arbitrator had omitted to state any fact in the case which would assist the appellant in his claim.

LORD JOHNSTON was absent.

The Court answered the question in the affirmative and dismissed the appeal.

Counsel for Appellant—Crabb Watt, K.C.—A. M. Mackay. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents—Wilson, K.C. —Mitchell. Agents—Adamson, Gulland, & Stuart, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

DOBBIES *v.* THE EGYPT AND LEVANT STEAMSHIP COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule, Sec.* 1—*Dependency—Probability of Support.*

Although it is proved that at the time of his death a father has deserted his children for three years, and paid nothing towards their support during that period, it does not necessarily follow that the children were not dependent, or at least partially dependent upon his earnings, for it may be capable of proof that there was a probability of his supporting them in the future.

Janet Helen Dobbie and Helen Yates Dobbie, *appellants,* claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII cap. 58) from the Egypt and Levant Steamship Company, Limited, 22 Leadenhall Street, London, *respondents*; and being dissatisfied with the determination of the Sheriff-Substitute of the Lothians and Peebles (Guy), acting as arbitrator under the Act, appealed by Stated Case.

The Case stated—"This is an arbitration in which the appellants, aged nine and six years respectively, the pupil children of the deceased John Dobbie, who resided at No. 2 Bothwell Street, Leith, claimed compensation from the respondents under the Workmen's Compensation Act 1906 for the death of their said father, who it was admitted was drowned at sea on or about 18th December 1911, while in the course of his employment with the respondents as a fireman on board the s.s. "Wingrove," and whose average earnings on board said steamer amounted to £1, 14s. 5d. a week, in respect that the appellants were dependent on the earnings of their deceased father in the sense of the said Act.