tion *John Walker & Sons, Limited*, 1914 S.C. 280, 51 S.L.R. 246; also petition *Macfarlane Strang & Company, Limited*, 1915 S.C. 196, 52 S.L.R. 113. It appears to be assumed in the Act that the company is not to lose its identity—the authorised alteration must be for its advantage as a going and continuing concern.

"The power to amalgamate may however in the present case be allowed, as the company has it under its contract of copartnery, and amalgamation of shipping companies is by no means unusual.

"In view of the above-mentioned decision of your Lordships, and the powers allowed in that and in other previous cases, the reporter is of opinion that the present application may be confirmed as regards all the objects included in the special resolution other than that of selling or disposing of the undertaking.

"If your Lordships should see fit to refuse that power, the words 'any part of' should be added after the words 'dispose of,' and the word 'undertaking' in the same line (petition, p. 12, *v.*) deleted; and that the words 'or any part thereof' should be also deleted (lines 3 and 4 of the same subsection)."

In the Single Bills the petitioners cited *Macfarlane, Strang, & Company, Limited*, 1915 S.C. 196, 52 S.L.R. 113, in which the Court had granted power to sell though the same reporter had reported against it. *John Walker & Sons, Limited*, 1914 S.C. 280, 51 S.L.R. 246, was distinguishable in respect that there was no power to amalgamate in that case, while in the present case there was.

The Court, after taking the case to avizandum, pronounced the following interlocutor—

"Confirm . . . the alterations made with respect to the objects of the company contained in the memorandum of association of the company . . . subject to the following modifications upon subclause (*v*) of the third clause of the said memorandum of association, namely—(1) Delete the word 'undertaking' occurring therein, and the words 'or any part thereof' also occurring therein; and (2) Insert the words 'any part of' between the word 'of' and the word 'the,' both occurring in the first line thereof as printed on page twelve of the petition, so that such sub-clause (*v*) shall read as follows, namely—'(*v*) To sell, transfer, or dispose of any part of the property and rights, heritable or moveable, real or personal, and business of the company for such consideration as the company may think fit, and in particular for cash or for shares, stock, debentures, or securities of any other company, or partly in one and partly in another or others of such modes.'"

Counsel for the Petitioners—Wilton, K.C.—Burn Murdoch. Agents—Davidson & Syme, W.S.

HOUSE OF LORDS.

Monday, April 7.

(Before the Lord Chancellor (Birkenhead), Lord Buckmaster, Lord Atkinson, Lord Parmoor, and Lord Wrenbury.)

GRANT *v.* KYNOCH.

(In the Court of Session January 19, 1918, 55 S.L.R. 220, and 1918 S.C. 185.)

Workmen's Compensation — Accident — Blood-poisoning — Handling Artificial Manures—Time and Manner of Infection — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1).

An employee in a manure factory whose work consisted in the handling and bagging of artificial manures composed largely or wholly of bone-dust, became ill with blood-poisoning and died. The point of infection was a scratch on one of the man's legs. The germs which caused the blood-poisoning were present in large numbers in the manures, but were also to be found though in a lesser degree in decaying matter, dust, the air, and on the skin and clothes of persons of uncleanly habits. It was not proved when or how the deceased received the scratch or when the infection occurred, though it was in the highest degree probable on the medical evidence that he received the infection from the germs contained in the bone-dust. The arbitrator awarded compensation. *Held* (*rev.* judgment of the Second Division, *dis.* Lord Atkinson, *dub.* Lord Wrenbury) that there was evidence on which the arbitrator could competently find that the deceased's death was due to an "injury by accident" arising out of and in the course of his employment.

Observations as to the degree of particularity with respect to the time and manner of infection required to be ascertained in cases of disease due to infection by bacillus.

Brintons Limited v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, *followed.*

Authorities examined.

The case is reported *ante ut supra.*

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The appellant claims compensation under the first section of the Workmen's Compensation Act 1906 in respect of the death of her husband James Grant. The section is as follows—"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."

The facts of the case are compendiously set out in the findings of the arbitrator—the third to the ninth inclusive. These findings must be accepted by your Lordships,

unless there was no evidence on which they could be based. The relevant findings are as follows—"3. On 31st January 1916, while engaged at his work, the deceased became ill with blood-poisoning, from which disease he ultimately died on 16th February. 4. Said illness was due to infection by germs known as streptococci and staphylococci. 5. The point of infection was a scratch or abrasion on the skin of the left leg. 6. It was not proved when or how the deceased received the said scratch or abrasion. 7. It was impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill. 8. The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in decaying matter, in dust, and in the air, although in a much lesser degree. They may be found on the skin and clothes of persons of uncleanly habits. 9. I was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poisonous germs contained in the bone dust which he handled in the course of his employment, and I so found in fact."

The Judges of the Second Division of the Court of Session were concerned with two questions of law stated by the arbitrator for their opinion. A collateral issue raised in an earlier question disappeared. The two surviving questions were the following—1. Was the blood-poisoning which caused the death of the said James Grant an injury by accident within the meaning of the Workmen's Compensation Act 1906? 2. Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of the said Act? Their Lordships decided on the 19th January 1918 that the second question stated above must be answered in the negative, and that it was therefore unnecessary to answer the first. The present appeal is brought from that decision.

In my opinion the judgment of their Lordships cannot be supported. I should indeed have thought the matter particularly clear if two of your Lordships had not taken a different view. I am of opinion that the matter is concluded by authority. In *Brintons, Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, it was held by this House, Lord Robertson dissenting, that the assault of a bacillus upon a workman proceeding from the wool upon which he was working, and affecting him with mortal anthrax, was an accident, and that the consequent and fatal disease was an injury. In that case, therefore, the essentials of the composite phrase "injury by accident" were satisfied. This decision may easily prove with the development of scientific discovery to be one of far-reaching importance. Had your Lordships been invited to reach this conclusion in the absence of authority I should have given the most anxious attention to the many powerful arguments contained in the dissenting judgment of Lord Robertson. But I am clearly of opinion that *Brintons'* case does in fact govern the present case. The sequence of incident is a little difficult to describe in precise speech, because the Courts have necessarily applied to infection by microscopically small organisms language which is more commonly used of, and therefore suggests, larger and more material forces; thus the invasion of the bacillus is conceived of as a blow or physical assault. And an interval is assumed (perhaps rightly) before the assault, which is the accident, and is followed by the infection or contraction of disease, which is the injury. When *Brintons'* case was decided the area conceded by contemporary science to idiopathic disease was much larger than is the case to-day. It follows that the area of disease which is now traced to infection by bacillus has correspondingly grown. The result is that the decision in *Brintons* is likely to increase in range. But no apprehension founded upon these scientific observations can affect our duty to follow the decision when once we are agreed upon its scope. The course of the discussion in the present appeal renders it in my view impossible any longer to contend that the facts of this case can be distinguished from those before this House in the earlier case. Lord Macnaghten, at p. 234, enumerated a series of accidental circumstances disclosed by the facts. After mentioning others he added—"It was an accident that the thing struck the man on a delicate and tender spot in the corner of his eye."

I asked Mr Sandeman whether it was not equally an accident within the statute that the bacillus in the present case struck the man on an accidental abrasion of the skin. He very candidly, and I think necessarily, admitted that he could draw no distinction between the two cases. He added that he was thrown back upon his submission that there was no evidence justifying finding No. 9 of the arbitrator. Before examining that contention an observation may be made upon the arguments at one time pressed upon your Lordships, that if the findings be supported every disease which proceeds from bacilli—for instance, influenza—must be brought within the statute. It is a partial and perhaps a complete answer to this objection that in proceedings under the Workmen's Compensation Act it is for the applicant to prove his case. He must satisfy the arbitrator that the bacillus infection which is said to constitute the accident invaded his system under such circumstances that the accident arose "out of and in the course of the employment." Where, as in *Brintons* and the present case, the bacillus is not met with, or is very rarely met with, except among the implements or the materials of the particular employment, the *onus* which is imposed on the applicant is obviously very much lightened. But where the invading bacillus may be found anywhere—in the train, in the home, or in the public-house—a prudent arbitrator will require strict proof such as can hardly in the nature of things be often forthcoming that the "accident" in fact arose "out of and in the course of the employment."

It will often be necessary to draw inferences, and here the language used by Lord Loreburn in *Rice's* case, [1912] A.C. 238, 48 S.L.R. 1095, should be borne in mind—"What you want is to weigh probabilities if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other."

I may add that the decision of the Second Division against the claim was founded on the fact that the particular time and the particular place at which the contact of the abraded surface with the poisonous matter took place cannot be definitely ascertained. It is, no doubt, the fact that in *Brintons'* case a particular time was found as being that at which the contact had occurred. But all that is material is that the infection should have been the result of contact at some one particular time, and that this one particular time should have been during the course of the employment. Some expressions such as those referred to in the judgment of the Second Division have been from time to time used, but none of them are binding upon this House, and, indeed, when these various expressions are examined in connection with one another they appear to me to come to no more than this, that it must be established that the disease is due to some particular occurrence, otherwise it cannot be the result of accident. That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment.

It only remains to deal with the contention that there was no evidence sufficient to justify finding No. 9. I am unable to accept that view. Your Lordships were not afforded the convenience of reading the medical evidence, but the arbitrator has made reference to its effect, and his successive notes set out in the appendix lead me to a clear conclusion upon this point. He says—"But the inference which I think must be drawn from the medical evidence is that it is in the highest degree probable that the deceased received the infection from the germs contained in the bone-dust and highly improbable that he contracted it elsewhere. This was the opinion of Dr Taylor and Dr Smith, who both attended the deceased during his illness, and were therefore best qualified to express an opinion on the matter. I do not think it necessary to examine the evidence of the medical witnesses in detail." And he continues in his second note—"But the medical evidence convinced me that the only reasonable inference to be drawn from the facts was that the deceased had contracted the infection from the material in the appellant's works."

In my opinion medical evidence of this kind is exactly the class of evidence which is proper to be brought before an arbitrator. It is his duty, having regard to the fallibility even of instructed medical opinion upon such matters, to weigh it carefully and even critically. If after having so weighed it he is convinced by it, he is entitled and bound to say that the appellant has proved his case. I think that the arbitrator in the present case handled the matter with judgment and ability. There was abundant evidence to justify his findings, and accordingly I move your Lordships that the appeal be allowed with costs.

LORD BUCKMASTER—Cases of this kind are always painful to consider and hard to decide. A man is engaged in work hazardous to health, and it may be to life itself. Disease, followed by a ruined constitution or even death, may ensue, and yet so far as the common law is concerned there is no remedy. Whether any relief is granted by statute is uncertain. The Workmen's Compensation Act of 1906 provided for compensation for "personal injury by accident arising out of and in the course of" the workman's employment, and section 8 brings certain diseases within the right to compensation subject to the conditions there set out. The words of the statute have been open to much criticism. Simple as they appear to be, their application to particular incidents has been found so difficult that the law reports are full of various decisions, each attempting, and attempting in vain, to provide some fixed canon of interpretation from which a rule can be established for future guidance.

The particular case which now arises for consideration shows with what little success these efforts have been crowned. James Grant, the husband of the appellant, was a workman engaged at 25s. per week wages in handling and bagging artificial manures. These manures are highly impregnated with the germs known as streptococci and staphylococci. If the defensive barrier of the skin be broken down by abrasion or scratch these germs find ready access and blood-poisoning is set up, only too often with fatal consequences.

James Grant, while engaged at his work, had such an abrasion on his left leg. It is not known how it was caused, and it cannot be related to his employment. Infection took place at this spot, and he became ill on the 31st of January 1916 while engaged at his work, and died on the 16th of February.

It is not possible to state within any exact limit of time when the infection actually occurred; but the arbitrator in his special case found the following facts:—That the infection which caused the illness and death was derived from poisonous germs contained in bone dust handled in the course of his employment. The question to be answered is this:—Was this finding justified, and does it show that the injury was due to an accident in the course of and arising out of his employment?

Death due to disease differs widely from death due to other injury in many obvious respects. The actual occurrence and onset of the illness cannot be stated with the same certainty; the possibility of infection from other sources than the source of infection present at work, cannot be overlooked; and the difficulty of bringing these conditions

within the common meaning of the phrase "accident" is in itself considerable."

These difficulties are illustrated by a series of cases in which similar matters have come before the Courts for decision, and which needs examination. It is, I think, right to say that the earliest of these in which infection by hostile micro-organisms was held to be within the statute was the case in your Lordships' House of *Brintons Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862. In that case a wool sorter died of anthrax, and it was held that his representatives were entitled to recover. It was found as a fact by the County Court Judge, who awarded compensation, that the disease was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased's person which afforded a harbour in which it could multiply and grow and so cause a malignant disease and consequent death. It was held that this was an accident, because, in the words of Lord Macnaghten, it was an accident that the noxious germ happened to be present in the material that the deceased was sorting, that it had escaped the means provided by downdraught or suck of the fan, that it struck the man in the corner of his eye and so found entrance into his system, and as this accident caused death the case was clearly within the statute. The importance of this decision lies in the fact that it included disease within the definition of accident, and disregarded the cases that had formerly suggested that the onset of the disease must be the sequel of an accident causing physical injury received in the employment.

In *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677, the Court of Appeal decided that enteritis due to inhalation of sewer gas suffered by a man engaged in work on sewers was not an injury by accident. And in *Martin* v. *The Manchester Corporation*, 1912, 5 B.W.C.C. 259, it was also held that the contraction of scarlet fever in a fever hospital by the porter whose duty it was to clean out the mortuary and attend to the wards of a fever hospital was again not injury by accident.

In *Jenkins* v. *Standard Colliery Company, Limited*, 1911, 5 B.W.C.C. 71, and *Chandler* v. *Great Western Railway Company*, 1912, 5 B.W.C.C. 254, death due to blood poisoning was also held outside the statute. In the former case the decision depended entirely on the consideration of whether the physical injury had been caused in the course of the work, but in the latter the question of the actual cause of the disease was discussed, and the reasoning is strictly relevant to the present case. A man had injured his thumb away from his work, and this injury was the source of the infection. Both Moulton, L.J., and Cozens Hardy, M.R., were apparently influenced in their conclusion against the claim by the fact that the dirt with which the broken surface would have been brought in contact in the course of the deceased's occupation was not from its nature a probable vehicle for the germs. This reasoning was wholly unnecessary, except upon the hypothesis that had the material been, as it was in the present case, of a poisonous nature, different conclusions might have been reached. Lord Wrenbury, then Buckley, L.J., said the cause of the disease was a mere guess.

The facts of these cases are undoubtedly the nearest to those under consideration in the present instance; but there is another series of decisions which also demands attention. In *Glasgow Coal Company* v. *Welsh*, 1916 S.C. 141, 53 S.L.R. 311, a man contracted rheumatism from standing in water which he had been directed to bale out, and this was held to be an accident within the meaning of the statute.

In *Drylie* v. *Alloa Coal Company, Limited*, 1913 S.C. 549, 50 S.L.R. 350, where a miner on the breakdown of the pumping machinery was kept standing in water and contracted pneumonia, it was held to be an injury due to accident within the meaning of the statute. And in *Brown* v. *John Watson, Limited*, [1915] A.C. 1, 1914 S.C. (H.L.) 44, 51 S.L.R. 492, under similar circumstances the same conclusion was reached. Lord Dundas, however, in *Drylie* v. *Alloa Coal Company, Limited*, expressed his view that disease was not an accident at all unless it could be definitely collocated in the relation of effect to cause with some unusual, unexpected, or undesigned event arising at an ascertained time out of the employment.

I doubt if this careful analysis is sufficient. If, for example, in the case of *Brintons Limited v. Turvey* (*cit. sup.*) it had been shown that several other workmen had all contracted anthrax, so that the disease could not be described as unusual or entirely unexpected, I cannot think that such circumstance would have destroyed the foundation upon which Lord Macnaghten's opinion was based. The accident would have been more common, but it would still have been an accident. Nor again is it possible to relate with certainty the onset of any bacterial attack to a time ascertained with anything approaching to the certainty that attaches to an ordinary physical injury. In the case then under consideration where the pneumonia was strictly traceable to the chill caused at a particular moment, these conditions could possibly be satisfied, but I cannot think they are of universal application; nor, if disease be accepted—as in certain cases *e.g. Brintons Limited* v. *Turvey* shows that it must—as an accident within the meaning of the statute, can the conditions of these decisions be formulated by any rigid or unyielding principle.

In *Lyons* v. *Woodilee Coal and Coke Company*, 1917 S.C. (H.L.) 48, 54 S.L.R. 404, Lord Loreburn quotes these dicta of Lord Dundas, and adds "that as there are many causes of most events, it (*i.e.* the connection between the work and the disease) must be a connection which is not as a matter of commonsense too remote;" the arbitrator had there found against the claim, and his decision was upheld. This statement appears to me to afford some clue for the solution of the problem and helps to apply the decision in *Brintons Limited* v. *Turvey* to the present case. Anthrax, it is true, is a disease of such rare and peculiar nature that it is possible with a certainty which is denied to more common complaints to analyse its origin.

Blood poisoning, on the other hand, is a comparatively frequent disease, and its sources are manifold; but, when the infection has been found as a fact by the arbitrator to be due to the impregnation of germs acquired by a man in the course of and arising out of his employment, and such a decision is warranted by the facts "and is not as a matter of commonsense too remote," it becomes impossible to distinguish the reasoning that would establish liability from that used in the case of *Brintons Limited* v. *Turvey*. It was precisely this difficulty that led to Lord Robertson dissenting in that case from the judgment of Lord Macnaghten and Lord Halsbury. But it cannot have been his reasoning—which indeed appears to be unimpeachable—which caused the difference of opinion. It was because the other noble Lords did not shrink from adopting a course which led to the conclusion which he rejected but they did not.

Just as in the former case Lord Macnaghten regarded the incidence of the anthrax germ as an accident, so also it appears to me the incidence of the streptococcus must be regarded in the present case. It was an accident that the germs fell upon the deceased. It was an accident that they came in contact with the abrased surface of his skin, and from these accidental circumstances resulted the illness which ended in death.

For these reasons I think that the Court of Session were wrong in rejecting the award of the arbitrator; and I am of opinion that their interlocutor should be reversed.

Lord Atkinson — I regret that I am unable to concur in the judgments which have been delivered. The judgment I am about to read was written after the first hearing. I have not heard anything in the two arguments to change the opinion I then formed.

The finding of the arbitrator in this case amounts to this—that the most probable source of the bacilli which caused the blood-poisoning of which the deceased died was the bone dust which he was employed to handle and did handle in his daily work. The evidence will not support any conclusion beyond this. It is impossible in the nature of things to say positively at what time these germs enter the human body. They themselves are too minute to be seen, or their movements to be heard or felt. And all that I think can be required to bring a case within the statute as to this point is a preponderating probability that the workman was infected while he was engaged in doing the work he was employed to do, from a source of infection into which he was brought in contact by that work.

In the owners of the "*Swansea Vale*" v. *Rice*, [1912] A.C. 238, 48 S.L.R. 1095, where a seaman's disappearance from a ship at sea was unexplained, Lord Loreburn in giving judgment said — "What you want is to weigh the probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective values, the one against the other." It is, no doubt, true that evidence which is equally consistent with two conflicting contentions or issues is no proof of either. But that, of course, does not apply where there is a preponderance of evidence in favour of one of these contentions as against the other. Moreover, probability itself may vary in degree from what amounts almost to absolute certainty to mere conjecture or surmise. And in the wide scope of the science of bacteriology, by which almost every disease is attributed to the entrance of bacilli into the human organism, anything more than probability cannot, I should think, be attained. Yet the second section of the Workmen's Compensation Act of 1906, identical in terms in this respect with the second section of the Workmen's Compensation Act of 1897, requires that the person injured shall state in ordinary language in the notice he is required to give the cause of the injury and the date at which it was sustained.

In *Brintons Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, I cannot find any indication whatever either in the report of the case in the Court of Appeal, [1904] 1 K.B. 326, or in that of it in this House, of the nature of the notice given, or whether the evidence was deemed to show the precise time and occasion upon which the bacillus producing anthrax struck the workman's eye or invaded his body. From the telling and pointedly expressed judgment of Lord Robertson in that case I should conclude that this was unascertained and unknown. The finding of the County Court Judge in that case, which if this be so must have been based upon probability, was accepted, and the judgment of Lord Macnaghten, so much relied upon, was expressly based upon it. The point, however, was dealt with in the judgment of the Court of Appeal in *Steel* v. *Cammel Laird & Company Limited*, [1905] 2 K.B. 232. In that case the workman was paralysed by lead poisoning. His work was that of a caulker, and in the course of it he had to smear with his hands white and red lead over certain rope yarns. Gradually, and as a result of his working with these materials, his system became saturated with lead, either by absorption through the pores of the skin, or by inhalation while using the red lead, which was in powder, or by transference to the intestines while he was eating his meals. On the 19th of December 1904 he was seized with cramp in his hands, which was the commencement of paralysis due to lead poisoning. Ultimately he was totally incapacitated for work. Collins, M.R., at the bottom of p. 236, is reported to have said—"It is not possible to indicate any precise time at which the mischief arose. It seems to me that the provisions of sec. 2 of the Act (*i.e.*, the Act of 1897) show that what was dealt with are cases in which a date can be fixed as that on which the injury by accident came about. I am unable to find such a date in this case." The head-note of the case states the point of decision thus—"Held that to bring a case within the Act there must be, by reason of sec. 2, sub-sec. 1, an injury by an

accident of which notice can be given, and that since it was not possible to indicate a time at which there was an accident which caused the injury to the workman he was not entitled to an award under the Act." These considerations as to the requirements of this section would appear to me to account for the language used in some of the judgments given in subsequent cases on this point.

The judgment of Mathew, L.J., in the case contains a passage in reference to the meaning of the word "accident" which is illuminating. It runs thus—"We are told that its use (*i.e.*, the word accident's use) in popular language must be borne in mind, and the cardinal question will be whether, according to the ordinary use of language, this particular injury can be said to be accidental. The evidence on this point seems to me to be clear. The man was following a dangerous occupation, because it might involve the risk of lead poisoning. But the evidence shows that in the majority of cases the workman would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual it could not be said that the case was unexpected or fortuitous or unforeseen. It was certain that somebody would suffer, and this man turned out to be susceptible to the poison. It appears to me that the occurrence was not an accident."

In truth in one sense the catching of an infectious disease is always fortuitous or accidental. There is always an element of chance in it. The fact well known to everybody in his daily experience that if a given number of ordinary persons be at the same moment and under the same external circumstances brought into contact with the same source of infection, some of them will catch the disease while others will escape it proves this. But it was contended by Mr Sandeman on behalf of the respondents, with his usual brevity and precision, that the accident involved in catching disease from any source of infection with which a workman is brought into contact in his employment will not satisfy the words "injury by accident" contained in the Act of 1906; that, on the contrary, the "accident" to satisfy these words must be one which brings the workman into contact with the source of infection. By way of illustration he took the case of a hospital nurse employed in a hospital where persons suffering from a most infectious disease—scarlet fever—are admitted as patients. She is employed to tend these patients. Her duties bring her daily and hourly into contact with sources of infection. She deliberately, and presumably with full knowledge of the danger, runs the risks attending the discharge of these duties, hoping possibly to escape the consequence, but sooner or later she catches the disease. That event could not well be described as unforeseen or unexpected. And according to Mr Sandeman's contention it would not be an "injury by accident" within the meaning of the statute. In support of this contention he cited several authorities, the following amongst others—*Broderick* v. *The London County Council*, [1908] 2 K.B. 807. In that case the workman contracted enteritis by inhaling sewer gas in the course of his employment in sewers in which he was by the defendants hired to work. The County Court Judge found that it was an incident of his employment that noxious gases should be present in the atmosphere in which he worked, and that the work therefore involved the risk of being poisoned by such fumes, so that the result could not be said to be unexpected or fortuitous or unforeseen, but was a result which might be caused to anyone engaged in such work. The medical evidence was to the effect that this disease was usually caused by some irritant entering the system usually in the nature of a bacillus. It was held that the contracting of the disease was not "a personal injury by accident" within the meaning of sec. 8 of the Workmen's Compensation Act of 1906. And it was pointed out that it was laid down in *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 445 and 448, 41 S.L.R. 460, that that case did not involve the doctrine that all diseases contracted by a workman in the course of his employment were to be regarded as accidents within the meaning of the statute.

In *Martin* v. *Manchester Corporation*, (1912) 5 B.W.C.C. 259, the workman was a porter in a fever hospital, and part of his duty was to clean out the mortuary with cold water and attend in the fever wards. In February 1910 he had an attack of influenza which necessitated his leaving work. He returned on the 22nd March. He cleaned out the mortuary on the 1st April, in which it was not proved there was any dead body. After working about an hour he felt sick and dizzy. On the 2nd he felt worse and had a sore throat. On the 5th he got sick leave and developed scarlet fever, which totally incapacitated him for seven weeks. The doctor proved that scarlet fever took from four to seven days to develop. The County Court Judge found that the workman contracted fever on the 1st April, and that this was an injury by accident arising out of and in the course of his employment. It was held by the Court of Appeal that there was no evidence to support that finding. Buckley, L.J., as he then was, in delivering judgment, p. 262, said—"The contraction of the disease is an injury. That injury may or may not be by accident. In order that the man may succeed it is necessary he should show that the disease was contracted by accident. The workman must show how, when, where, to the satisfaction of the tribunal, the circumstances took place which constitute an accident. The most that can be said here is that this man was employed in a scarlet fever hospital, and it may be more probable that he contracted the complaint in the place where there were scarlet fever patients than in the street or his aunt's house. But that will not do." He then proceeds—"Even if he contracted it in the hospital, it is not enough, because you must show that he contracted it by accident."

In the case of *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677, the deceased workman was

employed as a gardener, labourer, and caretaker by the defendant at East Hall, Orpington, Kent. In July 1909 he was ordered by his employer to open certain cesspools for inspection. He did so, and was engaged four or five days in that work. Early in August he got unwell. In September he was found to be suffering from poisoning by sewer gas. And on the 30th October he died from ptomaine poisoning by sewer gas inhaled or absorbed into his system. In this as in the last case it was held by the Court of Appeal that the element of accident was absent, and that therefore the claimant could not recover. Kennedy, L.J., p. 688, referring to *Brintons Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, said—"According to the judgment of the House of Lords, if you can prove that on a particular day, though nobody saw it, a particular bacterium from the wool struck his (the workman's) eye, because his eye was afterwards found to be diseased, that is an accident. It is not easy to draw a clear line of distinction between that and what might I think have been found here on the medical evidence, that the death was due to toxin poisoning, which got into his body on one or other of the particular occasions on which the deceased worked in the cesspools. I agree, however, that in supporting the judgment of the learned County Court Judge we should be going rather further, as the findings stand, than any judgment that has yet been given as to what constitutes an accident. As it stands I cannot find any authority that would justify us in upholding this judgment, although for reasons which Lord Robertson indicates in *Brintons, Limited* v. *Turvey* I feel, speaking for myself, that it is difficult to distinguish such a case as the present from the case with which the Court had there to deal." I confess I feel myself in the like difficulty. To a like effect are the decisions as to the diseases of "beat hand" and "beat knee" contracted by a gradual process in the course of more or less prolonged work as in the cases of *Marshall* v. *East Holywell Coal Company, Limited*, (1905) 7 B.W.C.C. (O.S.) 19; *Gotley* v. *Owners of Backworth Collieries*, (1905) 7 B.W.C.C. (O.S.) 19; *Walker* v. *Hockney Brothers*, (1909) 2 B.W.C.C. 20.

In the present case all that appears from the findings of the arbitrator is that the deceased was for some time (he does not say how long) prior to the illness which terminated in his death, employed on the respondent's manure works handling and bagging artificial manure wholly or largely composed of bone dust. That in this bone dust noxious bacilli of a certain kind are found in large numbers, but are also found in lesser numbers in decaying matter in dust (presumably other than bone dust) in the air, and on the skin and clothes of unclean persons. That the deceased took ill on the 31st January and died on the 16th February following. He further finds that he was satisfied on the medical evidence that the noxious germ falling upon a scratch or abrasion on the left leg of the deceased infected him and caused the illness of which he died. But then he finds that it is impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill. Now on these findings it would appear to me to be very difficult if not impossible to state in the notice required to be given the date at which the injury was sustained, unless it be sufficient to state the probable date within limits, and second, it is clear that to come in contact with the most prolific source of infection was part of the duty of the deceased which he was employed to discharge.

Some assistance may, I think, be derived from those recent cases in which the contracting of a disease was held to be an "injury by accident" entitling the sufferer to compensation in order to see in what the fortuitous or accidental elements consisted. In *Drylie* v. *Alloa Coal Company, Limited*, 1913 S.C. 549, 50 S.L.R. 350, owing to a breakdown of a pump the water in a mine had accumulated so that the workmen had to stop work. They went to the shafts to ascend, and were kept there twenty minutes up to their knees in cold water, the cold air descending upon them. This abnormal exposure gave to the deceased a chill which set up the disease of pneumonia of which he died. His death was held to have been caused by "an injury by accident" within the meaning of the Act of 1906. An effort was made to show that the accidental breakdown of the pump, though it may have been the remote cause of the injury was not the proximate cause of it. At p. 554 of the report Lord Dundas in delivering judgment said—"The circumstance of Drylie finding himself immersed to the knees in icy cold water was abnormal. It in its turn was, as matter of fact, due to an abnormal cause, the stopping of the pump while the men were at work in the pit, and if the pneumonia of which he died was in fact caused by his immersion I think the elements of an 'accident' are here present." In *Coyle* v. *John Watson, Limited*, [1915] A.C. 1, 1914 S.C. (H.L.) 44, 51 S.L.R. 492, the decision in *Drylie's* case was approved of and adopted. In the former case the shaft of pit No. 2 in which the deceased was working was wrecked. The deceased and his fellow workmen were ordered to ascend by the shaft of pit No. 1, this being the downcast shaft which ventilated the mine. They were kept waiting at a mid-landing for an hour and a-half until those who usually ascended by that shaft had been raised. The first-mentioned lot of men, including the deceased, were thereby exposed to a cold down draught. As the result of this exposure the deceased got a chill which brought on pneumonia, of which he died. It was held that the death resulted from the exposure consequent on the wreck of shaft No. 2. And that there was evidence to support the finding of the arbitrator that the deceased sustained an "injury by accident" arising out of and in the course of his employment. Lord Dunedin in giving judgment, referring to *Drylie's* case, at p. 5, said—"It seems to me that here, as there, you have an accident interfering with

the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance depending on some cause other than the accident which occurred to break that chain of causation."

On the other side of the line is the case of *Lyons* v. *Woodilee Coal and Coke Company, Limited*, 1917 S.C. (H.L.) 48, 54 S.L.R. 404. There a workman employed in a coal mine finished his work and went to the bottom of the shaft at a time when he knew the statutory daily inspection was taking place. This inspection varied according to the time necessary to make any repairs required, but the cage usually took half-an-hour to descend. On this occasion, owing to a breaking of the bell wire, the cage occupied an hour in descending, during which time the workman stood in a cold current of air and contracted a chill which developed into pneumonia of which he died. The arbitrator found that the workman's decease was not an "injury by accident" arising out of and in the course of his employment. It was held, affirming the First Division, that the decision of the arbitrator was such as on the evidence he was entitled to make. Lord Loreburn on delivering judgment said —"Now in order to succeed an applicant must show that there was an accidental occurrence or condition—something unlooked for, some unlooked for mishap or untoward event which was not expected or designed—but he must also show that the injury was connected with it and consequent upon it, and as there are many causes of most events it must be a connection which is not as a matter of common sense too remote." In this judgment the other members of the House concurred. It is easy to detect the accidental element in these latter cases. They are relied upon to establish, and I think do establish, that that element must not lie in the mere catching of the disease but in bringing the workman into contact with the source of infection. I think the fair conclusion from them is that but for the accidental injury to the mine or its machinery, or the action of the latter, the decisions in those cases would have been the other way.

In the *Glasgow Coal Company, Limited* v. *Welsh* [1916], 2 A.C. 1, 1916 S.C. (H.L.) 141, 53 S.L.R. 311, a man employed as a brusher in a mine was directed by the owners of the mine to bale out a large quantity of water which had accummulated at the pit's bottom owing to the breakdown of a certain pump which had occurred four or five days earlier. The work necessitated the workman's standing up to his chest in water. He did not object to do this. There was no evidence that he did not know what its nature was. He was engaged at it for eight hours with the result that he contracted sub-acute rheumatism. In the body of the report it is stated that the Sheriff-Substitute found in law that this was an injury caused by accident arising out of and in the course of the respondent's employment. This is a question of law once certain facts are admitted or found.

Lord Lindley in *Fenton* v. *Thorley & Company, Limited*, (1903) A.C. 441 at 453, 41 S.L.R. 460, pointed out this very clearly; he said—"When personal injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an 'accident' within the meaning of the Act is a question of law on which the decision of the County Court Judge is not final." In the head-note it is stated that the arbitrator found that the rheumatism was caused by the extreme and exceptional exposure to cold and damp to which the man was subjected on the occasion in question. If that be an accurate statement of the finding it would, I should think, commend itself to the common sense of anyone. There are few ways I should think of contracting rheumatism more certain and effectual than standing up to one's chest in cold water for eight hours. It would appear to me to be a natural result of such an act. The difficulty in the claimant's case was to show that when this was done deliberately and willingly by a workman, who presumably was possessed of the ordinary intelligence of a human being, the catching of the disease was an injury by accident.

Lord Kinnear leaves no doubt as to how he regards the finding. At page 7 he said—"The finding which I take to be conclusive is 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." Lord Kinnear then proceeds—"I agree with my noble and learned friend that the Sheriff-Substitute cannot be said to have misconstrued the statute when he found further that this was an "injury by accident" arising out of and in the course of his employment. He cited *Fenton* v. *Thorley*, [1903] A.C. 443, 41 S.L.R. 460, in which Lord Macnaghten is treated as having given a definition of "accident" which in *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242, 47 S.L.R. 885, he asserted he never gave or intended to give, and Lord Kinnear apparently considered that this decision applied to the matter in hand, although in the former case the workman while making a sudden and very forcible effort to turn a wheel ruptured himself, never thinking or foreseeing or expecting he would do so, while here the immersion was deliberate. At page 6 he said that the connection between the injury and the bursting of the pipe was too remote.

Lord Haldane at page 4 of the report, after referring to the finding of the arbitrator as Lord Kinnear had cited it, said—"In order to make out his claim under the Workmen's Compensation Act 1906 a workman must prove that there was 'personal injury by accident arising out of and in the course of the employment.' The finding of the arbitrator, who was in this case the Sheriff-Substitute, is made conclusive as to whether he has done so unless there was on the face

of the award error in law or unless there was no evidence to support it." In the present appeal it is clear that it must be taken that the arbitrator found conclusively that there was injury due to an event arising out of and in the course of the employment. The one question is whether reading the award as a whole this event could be in point of law an "accident" within the meaning of the Act, for if so the arbitrator certainly had before him evidence upon which he could find it had happened. On the question so remaining I think the judgment of this House in *Fenton* v. *Thorley & Company* is conclusive if the definition of an accident within the meaning of the Act is an unlooked for mishap or an untoward event which is not expected or designed covering the present case.

Lord Haldane then goes on to state in what, as I understand him, the "accident" consisted. He said—"I interpret the finding of facts as amounting to this: That there was an entry into the cold water and prolonged exposure to it, the effects of which being miscalculated proved unexpectedly injurious. . . . Indeed it is plain that he went into the water to bale it out of the pit under directions from his employer, and he does not appear to have entertained such apprehensions of danger to himself as to induce him to disobey those directions. Had he died suddenly while so exposed, say of heart disease, caused by the shock, there can be no doubt that this would have given a title to his dependants to claim on the footing of injury from accident. I am unable to see why a claim in respect of a less serious mishap should be excluded by the circumstance that the miscalculated action of entering the water took time to produce its consequences. This miscalculated action of entering the water in the present case must be taken to have constituted a definite event which culminated in rheumatic affection." It was the miscalculation apparently which imported into the event the character of an accident within the meaning of the Act. The other noble Lords apparently concurred in this view. It would appear to me that according to it the fact that the consequence of an act done by a workman is its usual, normal, and natural consequence does not affect the question. It is rather the state of mind of the sufferer which determines whether the event is to have an accidental character or not. If he be so dull and unimaginative as not to foresee the normal and natural result of the "event," then the "event" has an accidental character. If he knows the "event" to have dangerous consequences, but through miscalculation runs the risk of encountering them, hoping and expecting to escape, the event will still have an accidental character. I cannot but think that the observation made by Lord Macnaghten in *Fenton* v. *Thorley & Company* if considered, as it ought to be, in connection with the facts to which it related, gives no support whatever to the proposition that the normal and natural consequence of an act done by any individual deliberately becomes an accident, because though he knows there are some risks attending the doing of it, he miscalculated the gravity of those risks. The heart disease from shock to which Lord Haldane refers would not appear to me (there is no evidence on the point) to be the normal and natural result of an act such as that of the claimant.

There is no doubt that every decision of this House in the exercise of its appellate jurisdiction on points of law is *prima facie* binding on the House, and that it is the duty of every one of its members loyally to accept and apply that decision; but if two decisions of the House be in conflict and absolutely irreconcileable the one with the other, one cannot in the nature of things accept and act upon both of them. I confess, with regret, that I am entirely unable to reconcile the decision in the last-mentioned case with the decisions in *Drylie's* case (approved of by the House) in *Coyle* v. *John Watson Limited* and in *Lyons* v. *Woodilee Coal and Coke Company, Limited*. In each of these cases it was held that an "accidental" character was given to the injury sustained by the workman by the fact that an accident to the machinery of the mine in which he worked, or to the mine itself, was a mediate or immediate but an effective cause of that injury, and that but for these accidents to things external to the workman himself his injury would not have acquired an accidental character. In the *Glasgow Coal Company* v. *Welsh* nothing of that kind occurred. There was no accident to anything external to the workman himself which was an effective cause, mediate or immediate, of the injury he sustained. I cannot find therefore that this decision affords any help to the decision of the present case. The arbitrator does not find here that the abrasion which he finds was the "point of infection" was inflicted upon the workman by the doing of his work in the respondents' factory, nor even while he was at work in that factory. The medical evidence upon which he bases his finding as to the "point of infection" is not given. There is nothing in the findings or in the facts stated to have been proved, to show whether this scratch was exposed, as was the workman's eye in *Brintons Limited* v. *Turvey*, or was covered and protected by the workman's clothes. Lord Macnaghten in that case, at p. 234 of the report, points out that the medical evidence seemed to be that without some abrasion infection by the anthrax bacillus is hardly possible, and he treats the fact that the bacillus struck the man "on a delicate and tender spot in the corner of his eye" where there was no abrasion, and thus entered his system, as in itself one of the accidents in the chapter of accidents which he describes. The workman had not therefore upon his body any spot which according to the usual course of things would be a point of attack for such bacilli. His shield against them was according to medical opinion almost complete. The one spot, and the only spot, in which he was vulnerable was the tender corner of his eye. It was treated as an accident that the bacillus hit that spot. These bacilli, known as streptococci and staphylococci, are found in the air.

It is, I think, impossible to suppose that they did not exist in considerable numbers in the atmosphere in which this bone dust so full of them was handled by the deceased. The medical evidence not being given one cannot know whether or not it was proved that these bacilli can or cannot gain access to the human body so as to infect it by the very act of breathing an atmosphere polluted by their presence. If the workman having this abrasion upon his skin, whether he knew of its existence or not, came deliberately to work with this polluted bone dust in an atmosphere thus polluted, possibly to a great extent, but at all events to some extent, the present case, save for one feature, resembles the cases of *Broderick* v. *The London County Council* and *Eve* v. *Hart-Dyke*, in both of which it was shown that the gas which the workmen had necessarily to breathe while at their work was noxious. The one distinguishing feature in these cases was that the poisonous effect of the gas was probably continuous and gradual, while the successful infection by the bacillus was a single occurrence, possibly a sudden occurrence. I cannot bring myself to think that this latter circumstance is sufficient to make the injury to the deceased in the present case accidental in character. There is another circumstance distinguishing this case from *Brintons* v. *Turvey*. There the workman was evidently employed to work with wool purified from microbes, or designed or attempted to be purified from them, by artificial means—the down-draughts caused by the working of a fan. The wool was the only source of the microbes. The second accident in the chapter of accidents described by Lord Macnaghten is the escape of the noxious bacillus from the draught of the fan which the Board of Trade required to be used for disinfecting Eastern wool. The first accident in the chapter is, he says, "that the noxious bacillus which settled on the man's face happened to be present in the material he was engaged in sorting." I think he must have been here referring to the wool after it had been submitted to the purifying process, for on referring to the report of the case in the Court of Appeal, [1904] 1 K.B. 328, I find it stated that the wool came from Persia, and was like other wool coming from the East liable to be infected with the bacillus of anthrax. Indeed, the requirement of the Board of Trade is only explicable on that ground.

I have not succeeded in finding any case in which it has been suggested, much less decided, that from the mere fact that a workman having a scratch upon him, possibly covered, has probably been infected by a bacillus probably coming from the matter he was employed to handle, but possibly coming from some other source, lighting upon this scratch, the illness supervening on that infection can legitimately be held to be an injury by accident within the meaning of the Workmen's Compensation Act.

In the absence in the present case of the medical evidence, and having regard to the loose and unsatisfactory manner in which I think the miscalled findings Nos. 7 and 8, if not the finding No. 9, have been framed, I am not satisfied that the applicant discharged the burden of proof resting upon her or that the decision appealed from was erroneous. I think therefore the appeal should be dismissed.

LORD PARMOOR—[*Read by Lord Buckmaster*]—The appellant is the widow of James Grant, who prior to his death was in the employment of the respondents at their manure works, Keith. On the 31st January 1916 the deceased became infected with germs known as streptococci and staphylococci, and died of blood-poisoning on February 16th. The point of infection was a scratch or abrasion of the skin on the left leg. There was no proof how or where the deceased received the said scratch or abrasion. The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in decaying matter, and in the air in a much less degree. They may further be found on the skin and clothes of persons of uncleanly habits. The arbitrator found that although it was impossible to say with certainty when the infection occurred, he was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poison germs contained in the bone dust which the deceased handled in the course of his employment, and found that the appellant was entitled to compensation.

Three questions of law were left for the opinion of the Court. The first and second were not argued in this House. The third —"Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906"—was answered in the negative in the Court of Session. It has been decided in this House in the case of *Brintons Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, that an accident which causes injury in the shape of disease, if it arises out of and in the course of his employment, entitles a workman to compensation under the Workmen's Compensation Act. In all cases an accident is a necessary factor, but if an accident causes injury in the shape of a disease it does not thereby alter its essential character, and the resultant injury is subject-matter for compensation. Whether an injury in the shape of disease is the result of an accident will depend on the circumstances of the particular case, provided that the assessing tribunal places the right meaning on the word "accident," and in other respects follows the directions of the Workmen's Compensation Act. I think therefore that in the present appeal, and in order to answer the question of the arbitrator, it is necessary to see whether the arbitrator did give the right meaning to the word "accident" as used in the Workmen's Compensation Act, and secondly, whether if the arbitrator did rightly construe the Act there was evidence on which the arbitrator was entitled

to find that the death of James Grant was caused by injury resulting from such accident. On the first point the arbitrator in my opinion did apply, as it was his duty to do, the decision in this House in the case of *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443, 41 S.L.R. 460—a decision followed and approved in the case of *Brintons Limited* v. *Turvey*. In the latter case Lord Lindley said—"The meaning of the word (accident) as used in the Workmen's Compensation Act was settled by this House in *Fenton* v. *Thorley & Company, Limited*," and in my opinion this House and all other tribunals are bound to follow the decision. The decision is contained in Lord Macnaghten's judgment—"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 an untoward event, which is not expected or designed." The arbitrator therefore had in the first place to determine whether the disease from which the deceased died can properly be said to have resulted from an unlooked-for mishap or untoward event which is not expected or designed. Personally I cannot doubt that there was evidence on which the arbitrator could find in favour of the claimant, adopting this test as he was bound to do. There is certainly medical evidence that it is in the highest degree probable that the deceased received the infection from germs contained in the bone dust, and highly improbable that he contracted it elsewhere. This was the opinion of Dr Taylor and Dr Smith, who both attended the deceased during his illness and were therefore best qualified to express an opinion on the matter. An issue of this character is necessarily one of probability, more or less, but it is impossible to say that, when a finding of fact is made on the balance of relevant probabilities, there is an absence of all evidence on which an arbitrator may competently base his finding. No one doubts that it is necessary for a claimant to establish his case, but if there is evidence on which it is competent for the arbitrator to decide, then the decision is within his jurisdiction, and not a matter of law for any Court of Appeal. In a further note the arbitrator states—"But the medical evidence convinced me that the only reasonable inference to be drawn from the facts was that the deceased had contracted the infection from the material in the appellants' works." Therefore if there was an accident it was an accident arising out of and in the course of employment which resulted in the death of the deceased. The arbitrator refers to the case of *Brinton* v. *Turvey* as an authority that the contracting of a germ disease may be an accident within the meaning of the Workmen's Compensation Act, and I am unable to see that he in any way misapprehended the decision of this House. He states his view that it was essential for the pursuers' case to prove that the fortuitous intrusion of the noxious germs occurred in consequence of the employment in which the deceased was engaged, and when this happens I cannot understand the argument that there is not an untoward event which is not expected or designed.

I am unable to agree in the judgment of the Lord Justice-Clerk that it is material to establish the claimant's case to prove where or when the deceased injured his leg. It is not suggested that the deceased was not in a fit state to go to his work and further inquiry is not material or justifiable.

The detailed opinion of Lord Dundas requires careful examination. With all respect to his Lordship I think that the earlier portion of his judgment, in which he states that he is far from clear that the finding in fact that the infecting germs came direct from the bone dust to the scratch, in course of handling, was warranted by the facts of the case, is in effect a consideration directed rather to the weight of evidence than to whether there was any evidence on which the arbitrator might competently act, and that in these cases the inquiry should be confined within the narrower limits in order to avoid any tendency towards an assumption of jurisdiction. The second portion of his Lordship's judgment is based on the assumption that though the claimant might be entitled to compensation as having established an accident and an injury, the time and circumstances of the alleged injury remained in obscurity, and that this by itself was fatal to the claim. In support of this proposition he refers to the case of *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677. It is not necessary to refer to the special facts of this case. There is no question that there must be a finding of fact that there is an accident in order to entitle a claimant to succeed in the claim for compensation under the Act, but the learned Master of the Rolls stated in the course of his judgment, p. 684—"Unless the applicant can indicate the time, the day, and circumstance, and place in which the accident has occurred, by means of some definite event, the case cannot be brought within the general purview of the Act and does not entitle the workman or his dependants to compensation." Lord Justice Farwell expresses his agreement with the Master of the Rolls, but Lord Justice Kennedy gives his decision on somewhat different grounds and gives no sanction to the proposition that, although an accident has in fact occurred which has brought about the injury, for which compensation is claimed, an applicant is not entitled to succeed unless he can indicate the exact time and day and circumstance and place in which the accident has occurred. There are some accidents in which such particularity would not be practicable. I am unable to draw any distinction between an accident which has been proved to have occurred at a particular hour on a particular day, and an accident in reference to which the particular hour or day cannot be established, but which certainly is proved to have occurred within some narrow limitation of time. The question is not so much the minute particularity of the occurrence as

the existence of competent evidence on which the arbitrator may find the causal connection between the accident and the injury. The passage from the judgment in *Drylie* v. *Alloa Coal Company* to which Lord Dundas refers does no more than emphasise the recognised principle that unless the disease which caused death is the result of an accident compensation cannot be claimed under the Workmen's Compensation Act.

In my opinion the interlocutor appealed from should be reversed and the award of the arbitrator affirmed, with costs here and below.

LORD WRENBURY—[*Read by Lord Atkinson*]—This case in my judgment involves no new or difficult question of law. In the absence of the evidence (none of which is before us) the difficulty lies in applying the law to the facts, for it is not easy to say what were exactly the facts found.

The man suffered personal injury, for he contracted a disease and it resulted in his death. Did he suffer that personal injury by accident? And if so, did that accident arise out of and in the course of his employment. The arbitrator found both of these in the affirmative. The Court of Session allowed an appeal. The workman appeals.

For the purposes of the Act an accident is not something without which personal injury would not have resulted, but something in consequence of which personal injury did result. If the man had not come to work on the day in question—if he had not sat at the bench at which he did sit, and so on—the injury would not have been sustained. But although colloquially it may be said that it was an accident that he sat at that bench, and so on, yet such events are of course not accidents within the meaning of the Act. The accident must be an untoward event which results in the injury. It must be something positive not negative, something active not passive. Thus in the present case the abrasion on the man's leg was something in the absence of which it may well be that he would not have contracted the disease, but it was not an accident within the Act that he had an abrasion on his leg. The question is whether he—being such as he was, viz., a man with an abrasion on his leg—suffered this injury (viz., contracting a disease) by accident.

Another point which I wish to put for the purpose of excluding it is the following. If an infectious disease is prevalent—or to put the point more closely, if the employment be in a place (say a fever hospital) where exposure to infectious disease is inevitable—some persons will take it and others will not. In one sense the catching of the disease will be fortuitous or accidental. But the one who does take it will not within the statute contract the disease by accident. As regards any particular person the event may happen or may not, but the happening is not an accident within the Act; it is the result of the fact that the particular person attacked was a particular sort of person, viz., one susceptible to infection. *Broderick* v. *The London County Council*, [1908] 2 K.B. 807; *Eke* v. *Hart-Dyke*, [1910] 2 K.B. 677; and *Martin* v. *Manchester Corporation*, 5 B.W.C.C. 259, are cases upon this point.

It is necessary therefore in the present case to look for the particular cause from which it resulted that this man, being such as he was, suffered, at a date which can in some sense be stated, personal injury by an untoward event. I take the words "cause" and "date" from section 2 (2) of the Workmen's Compensation Act 1906. I have to find some occurrence which is accidental and is extraneous to the disease itself from which the disease resulted, and that occurrence must be referable to the employment, and I must be able in a reasonable sense to fix the date at which the "accident" happened.

Jenkins v. *Standard Colliery Company*, 5 B.W.C.C. 71; *Wood* v. *Davis & Son*, 5 B.W.C.C. 113; and *Chandler* v. *Great Western Railway Company*, 5 B.W.C.C. 254, are all cases in which the workman failed because his evidence established at most that the admitted cause of the disease was *probably* one which operated in and in the course of the employment. He was bound to go beyond that, and to show not that it might have operated, but that it did operate, in and in the course of the employment.

Having said this much I turn to the findings of the arbitrator and the questions stated in the Special Case for the opinion of the Court. The Special Case states, and it would seem confuses, facts which were admitted or proved, and findings of the arbitrator upon the facts. Of the questions stated the only one which the Court of Session found it necessary to answer was the third, and that was in the following terms—"3. Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of said Act?"

That question the Court of Session answered in the negative. But the astonishing thing is that the evidence to which the question is addressed is not before this House, and so far as appears was not before the Court of Session. All that we have are the ten paragraphs, in which as I have said the case states, and it seems to me confuses, facts admitted or proved, and findings based on those facts. Paragraph 7 states that "it was impossible (meaning impossible upon the evidence) to say with certainty when the infection occurred, though it was probably some days before deceased became ill." Paragraph 8 states that the infectious germs are present in large numbers in the bone dust which the deceased had to handle, but they are also to be found elsewhere, and may be found on the skin or clothes of persons of uncleanly habits. Paragraph 9 follows these, and would seem to be based upon them, and is a finding of fact. It is to my mind most unsatisfactory. It finds that the infection was derived from the germs contained in the bone dust which the man handled in the course of his employment, but not that it arose in the course of his

handling it in his employment. It does not find that the infection (which par. 5 states as a fact was in the abrasion in his leg) was caused when he was at work—and in fact seeing that the basis of the finding is the medical evidence it cannot be that the evidence referred to was likely to contain anything on that point.

On the other hand, the third question must of course be read as meaning, "Was there evidence upon which as matter of law I was entitled to find injury by accident arising out of and in the course of the employment," and the parties have not before your Lordships raised the question that there was no evidence upon which the arbitrator could find as he did find. So reading the question I think that paragraph 9 may be said to amount to a finding that as matter of fact the injury arose by the accident that the germs found the weak spot in the abrasion on the leg, and (although I think this much more doubtful) that that happened in the course of the employment. If this be so, *Brintons Limited* v. *Turvey*, 1905 A.C. 230, 42 S.L.R. 862, which of course binds your Lordships, is I think in point.

As regards the point that the appellant has failed to fix the date at which the accident happened, I think the Act is satisfied in that respect if, having regard to the nature of the particular injury alleged, the date of the occurrence of the accident is reasonably fixed so as to connect the injury with the accident. Upon this paragraph 7 is far from satisfactory, but I do not say it is necessarily insufficient.

Upon the whole I am not prepared to differ from the majority of your Lordships when you arrive at the conclusion that the appeal succeeds.

Their Lordships reversed the interlocutor of the Second Division, and restored the interlocutor of the arbiter, with costs.

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