been handed to him. It was maintained for the pursuers that on the faith of these subscriptions made by the defender and others in similar positions, the pursuers entered into engagements and incurred liabilities which have more or less altered their position. I think this may be assumed to be more or less a fact arising from the nature of the company and the business they carry on, and in view of that these payments may without much difficulty be regarded as constituting *rei interventus* to the effect of depriving the defender of the *locus pœnitentiæ* he might have had if he had timeously and without making payments under the alleged contract taken the objection that there was no properly constituted contract at all in respect that the acceptance did not meet the offer.

On the whole matter, I think it is now too late for the defender to take up the position which was very ably stated by his counsel, and which, as I have already said, might have been impregnable had he taken it up on or shortly after the receipt of the certificate in return for the proposal. I accordingly have come to be of opinion that the pursuers are entitled to the declarator and decree for which they conclude in the summons, and that we ought to affirm the judgment of the Lord Ordinary.

LORD DEWAR—I agree.

LORD DUNDAS was absent, and LORD SALVESEN was sitting in the Lands Valuation Appeal Court.

The Court adhered.

Counsel for the Pursuers (Respondents)—M'Lennan, K.C.—Lippe. Agent—Isaac Fürst, S.S.C.

Counsel for the Defender (Appellant)—Mercer—Normand. Agents—Allan, Lowson, & Hood, S.S.C.

Saturday, February 11.

FIRST DIVISION.

[Sheriff Court at Glasgow.

SCOTSTOUN ESTATE COMPANY & ANOTHER *v.* JACKSON.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (15) *and Regulations of June* 27, 1907, *Article* 20—*Medical Referee.*

The Workmen's Compensation Act 1906, Second Schedule (15), enacts—"Any committee, arbitrator, or judge, may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration." The Regulations of 27th June 1907 provide—Article 20—"Before making any reference the committee, arbitrator, or Sheriff, shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter."

A workman while engaged in carrying joists for a house fainted, and subsequently died. Medical witnesses for the workman gave it as their opinion that death was due to rupture of the heart caused by the work on which he was engaged, while medical witnesses for the employers gave it as their opinion that death was due to heart disease. The Sheriff, acting as arbitrator, in consequence of said conflict of evidence, remitted to a medical referee to examine the evidence led and to report whether during the carrying of the joist the workman was injured by a rupture of the heart caused by the work and died therefrom, or whether he died of heart disease. The medical referee reported that the workman died from disease of the heart. Thereafter the Sheriff found that the workman died from a rupture of the heart caused by the strain of the work.

Held that the arbitrator was not bound to accept the medical referee's report as conclusive of the question which the Sheriff-Substitute had, as arbitrator, to decide, and that as there was some evidence to justify the award, it must stand.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II (15), and Regulations of June 27, 1907, art. 20, are quoted *supra in rubric.*

The Scotstoun Estate Company, South Whiteinch, Glasgow, and W. Talbot Crosbie, the only partner thereof, appealed by way of stated case from a determination of the Sheriff-Substitute of Lanarkshire (BOYD) at Glasgow, acting as arbitrator under the Workmen's Compensation Act 1906 (6 Edw. VII, cap 58) in an arbitration between the said company (*defenders*) and Mary Wardrop or Jackson, widow of the deceased Hugh Jackson, joiner, and Agnes Jackson, daughter of the said Hugh Jackson (*claimants*).

The Case stated—"The claim or demand of the pursuers was 'for an award of compensation under the Workmen's Compensation Act 1906, in respect that the said Hugh Jackson, husband of the pursuer Mary Wardrop or Jackson, and father of the pursuer Agnes Jackson, had been a joiner in the defenders' employment, earning a weekly wage of £1, 18s., and upon whose earnings the pursuers were wholly dependent, and know of no other dependents, and whilst engaged as a joiner at the erection by the defenders of cottages in Darnley Avenue, Scotstoun, on 6th October 1908, he, by accident arising out of and in the course of his employment, was injured, by the rupture of a blood vessel caused by lifting and carrying joists, in consequence of which he died on said 6th October, and the question which has arisen between the

parties is whether and to what extent defenders are liable to pursuers.

"'Therefore the pursuers crave the Court to award compensation in terms of the Workmen's Compensation Act 1906, and to find defenders liable in expenses.'

"The first deliverance on said petition was dated 14th January 1909.

"Parties were heard and proof was led before me, and after certain witnesses had been examined the proof was adjourned for the examination of further witnesses, and before a new diet was fixed the respondents moved me to allow them to amend the petition by adding after the words 'by the rupture of a blood vessel' in said petition, the words 'muscle or valve of the heart,' and I allowed them to amend accordingly. In the course of the proof three medical witnesses were examined on behalf of the respondents, who gave it as their opinion that the deceased Hugh Jackson died from rupture of a blood vessel, muscle, or valve of the heart, and three medical witnesses were examined on behalf of the appellants, who stated that in their opinion the deceased died from heart disease. In consequence of said conflict of evidence I remitted to David Newman, M.D., one of the medical referees appointed by the Home Secretary under the Act, to examine the evidence led before me, and to report on the following matter, viz., Whether during the work of carrying one end of a joist as described in the evidence the late Hugh Jackson was injured by the rupture of a blood vessel, muscle, or valve of the heart, caused by the said work, and died therefrom, or whether he died of heart disease. The said medical referee reported as follows—'In accordance with the foregoing reference I have examined the evidence led before Mr Sheriff Boyd, and I beg to report as follows on the question submitted to me, that the late Hugh Jackson died from disease of the heart.—David Newman, M.D.'

"Having heard parties' procurators, and considered the cause, I find the following facts to be established—(1) That the late Hugh Jackson, who was fifty years old, was a carpenter in the employment of the appellants. (2) That he supported his wife and a daughter of 21 years, who were dependent on him. (3) That his wages were £2, 0s. 4½d. per week, and his wages for three years were £280. (4) That on 6th October 1909 he was engaged along with an apprentice in carrying joists for a house which appellants were building. (5) That the joists were pitch pine and white pine, the former being 33 feet by 9 inches by 2½ inches, and about 2 cwt. in weight, and the latter 25 feet by 9 inches by 2 inches, and about 1 cwt. in weight. (6) That the foreman lifted one end of the joist on to a trestle and helped the apprentice to put the other end on his shoulder. (7) That Jackson then took on his shoulder the end that rested on the trestle, and they carried the joists about 60 yards. (8) That the day was hot and oppressive. (9) That the work was not excessively heavy, nor was it light; it may be stated as fairly heavy work. (10) That the deceased was so employed for half an hour in carrying pitch pine joists, and he was helping to carry a white pine joist when, as he arrived at the place of deposit, he dropped his end of the joist on the ground, and fainted and fell. (11) That he lay about seven minutes unconscious, and Dr Cumming came after he recovered and took him into his house, where he remained between 5 and 10 minutes. Dr Cumming was the only medical man who saw him in life, and he deponed that he found the heart giving a soft murmur, which the appellants' other medical witnesses took as evidence of heart disease. I thought Dr Cumming was inaccurate in many of his statements, and that he was not a satisfactory witness to a vital part of the appellants' case. Further, I found (12) That accompanied by a lad, Jackson went home by tram-car, and walked up two flights of stairs to his house, and lay down on the sofa. (13) That immediately after he went to bed, and in about five minutes he seemed to choke and died. (14) That it is not proved that the deceased was formerly affected by heart disease, but on previous occasions he had complained of tightness in the chest and breathlessness. (15) That he died from a rupture on the left side of the heart caused by the strain resulting from the work in which he was engaged. I therefore found the respondents entitled to compensation, and awarded them the sum of Two hundred and eighty pounds, with expenses."

The *questions of law* for the opinion of the Court were—"(1) Whether the arbiter, having, in terms of the statute, remitted the evidence led to the medical referee for report as to the cause of the death of Hugh Jackson, was bound to accept or be guided by the medical referee's opinion. (2) Considering the facts proved, and the remit and report, whether there is sufficient evidence to find that deceased died from a rupture of the left side of the heart caused by the strain resulting from the work in which he was engaged."

Argued for the appellants—(1) The remit involved the whole question in the case, and the arbitrator was bound to accept the medical referee's opinion. Reference was made to *Ferrier* v. *Gourlay Brothers*, March 18, 1892, 4 F. 711, Lord Moncrieff at 718, 39 S.L.R. 453; *Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239; *Gray & Sons* v. *Carroll*, 1910 S.C. 700, 47 S.L.R. 646. (2) In any case as the remit *ex hypothesi* of the Second Schedule, Art. 15, could only be made if the evidence were conflicting and unsatisfactory, it followed that the award of the Sheriff was contrary to the weight of the evidence. If that were so, they submitted it could not stand.

Argued for the respondents—A report under Second Schedule (15) was not conclusive. It was not said to be final as it was in First Schedule (15). The distinction was referred to by Lord Trayner in *Bryce & Company* v. *Connor*, December 6, 1904, 7 F. 193, at 199, 42 S.L.R. 154. In *Dowds* v. *Bennie & Son* (*cit. sup.*), Lord Adam, at

p. 273, had expressed the opinion that such a report was not conclusive. It was true that in *Ferrier* v. *Gourlay Brothers* (*cit. sup.*) it had been held conclusive (Lord Young dissenting), but the reasoning in that case was disapproved in *Strannigan* v. *Baird & Company, Limited*, June 7, 1904, 6 F. 784, 41 S.L.R. 609. Reference was also made to *Anderson* v. *Darngavil Coal Company, Limited*, 1910 S.C. 456, 47 S.L.R. 342. The question was, was there evidence on which the Sheriff could come to the conclusion to which he had, not whether he was right in that conclusion.

At advising—

LORD PRESIDENT—In this case the deceased Hugh Jackson was a workman in the employment of the appellants, and while working and engaged in carrying joists for a house he suddenly dropped his end of the joist which he was carrying, and fainted. He lay unconscious, and was then seen by a doctor, who took him to his house, where the doctor remained for about five or ten minutes. He afterwards went home accompanied by a lad, and when he got home he went to bed, and after about five minutes in bed he died.

Death was caused by a rupture of the left side of the heart.

In the course of the proof medical witnesses were examined upon both sides. The medical witnesses for the applicants gave it as their opinion that the death was due to a rupture caused by the strain resulting from the work in which he was engaged—in other words, that the death resulted from the accident. Medical witnesses on the other hand, basing their view upon certain sounds that the doctor who had seen him in life deponed to, gave it as their opinion that the deceased died from heart disease—that is to say, in other words, that he would have died from heart disease even although he had not been engaged in the work that he was engaged in nor undergone its special exertion. No post-mortem was held.

The learned Sheriff says in the stated case—"In consequence of said conflict of evidence I remitted to David Newman, M.D., one of the medical referees appointed by the Home Secretary under the Act, to examine the evidence led before me, and to report on the following matter, viz., whether during the work of carrying one end of a joist as described in the evidence the late Hugh Jackson was injured by the rupture of a blood-vessel, muscle, or valve of the heart, caused by the said work, and died therefrom, or whether he died of heart disease."

Now as far as that question goes it is quite clear that the question is framed as an alternative—that is to say, there is an antithesis between dying from rupture caused by the work (that is to say, death resulting from the accident, to use the words of the statute), and dying of heart disease (which, if meant as an antithesis, obviously means that the death is not the result of the accident).

The said medical referee reported as follows—"In accordance with the foregoing reference, I have examined the evidence led before Mr Sheriff Boyd, and I beg to report as follows on the question submitted to me, that the late Hugh Jackson died from disease of the heart."

I have also no doubt that upon the question as framed that answer was affirmative of the second question, and not of the first; it was, to use the words of the statute, an answer that death did not result from the accident.

The learned Sheriff then goes on to say that, having heard parties' procurators and considered the cause, he finds the following facts to be established. He then gives a series of successive facts, one or two of which I have already mentioned in my narrative. I need not read any of them till I come to the fourteenth—"That it is not proved that the deceased was formerly affected by heart disease, but on previous occasions he had complained of tightness in the chest and breathlessness." "15. That he died from a rupture on the left side of the heart caused by the strain resulting from the work in which he was engaged." And then the Sheriff goes on—"I therefore found the respondents entitled to compensation, and awarded them" a certain sum. The question of law for the opinion of the Court is—". . . [*quotes*] . . ." And then the second question as put is—". . . [*quotes*] . . .?"

In order to deal with this first question as put, it is necessary to look at what the statute says about these remits. The justification for such a remit is to be found in the fifteenth section of the second schedule, and it says—"Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration." And in the regulations that are made it is provided that when there is a conflict of evidence he may, if he likes, remit the evidence for report to a medical referee.

There is nothing, your Lordships will observe, in the statute that in any way absolves the arbitrator from his duty as an arbiter. It is only a report that he gets from the medical referee, and therefore I think it would be impossible to affirm, as is indicated by one view of the first question, that the arbitrator was bound to accept the medical referee's report or opinion, that is to say, to accept it as conclusive of the whole matter. I leave out "or be guided by," because that is obviously inappropriate. Of course a report, if you get it, is meant to be read, and you are in a certain sense guided by anything which you consider. You are bound to be guided by all the evidence. The expression "guided" is a very unfortunate and unscientific expression, and really ought not to be in the question at all, but upon the real subject of the question, viz., whether, when you have remitted to a medical referee, you are, as matter of law, bound to accept the conclusion to which that medical

referee comes, I have no doubt whatsoever that the arbiter is not so bound. He gets a report, and must weigh that report just as he weighs the rest of the evidence.

On the second question put it is not for us to find how the deceased died. The Sheriff has come to a certain conclusion on fact, and unless we can say there is really no evidence on which that can be supported we cannot upset that conclusion. A legal finding of compensation due is a proper sequence to the fifteenth finding, that the man died from a rupture caused by the strain resulting from the work in which he was engaged. That is certain, because that fifteenth finding is just a finding in terms of the statute that death resulted from the accident; and if death resulted from the accident there is no more in law to be said, and I cannot here say that there is no evidence upon which that finding can be based, because the Sheriff has told me that there were doctors examined for the petitioners who deponed to that effect.

While I say that, and while I therefore think that your Lordships cannot interfere with the finding to which the Sheriff has come, I must express my great difficulty in penetrating the Sheriff's mind in the procedure he has taken here. To state first that you have conflicting evidence, and therefore, in order to help yourself, to take expert advice upon that conflicting evidence; then so to frame your question as really to put the whole determination of the fact to the medical expert; and then, having received from him a report upon that evidence (to help your mind, which is supposed to be oscillating) that the result is "A," without more ado to find that the result is "B," is to my mind a very curious mental process. But the arbiter is entitled to have curious mental processes if there is any evidence upon which they can be supported. I cannot say there is none here.

LORD KINNEAR — I am of the same opinion. It seems to me perfectly clear upon a consideration of the statute that the Sheriff or arbitrator is not authorised by the clause which your Lordship has quoted from the Second Schedule to delegate his duty of arbiter to a medical referee. That is not the plain meaning of the clause, taking it by itself. What it says is that he may submit to a medical referee for report any matter which seems material, that is, which seems to him material, to any question arising in the arbitration. I think it may be inferred that the matter so to be remitted to a medical referee is a medical question to be sent to him as an expert; but still it is to be remitted to him for report, and it is not assumed in the form of the enactment that the remit is to be of the whole question, which it is for the arbitrator or Sheriff to determine, but only of some particular question which in the course of his consideration of the general question submitted to him seems to him not to be clear. That would imply that the report which he is to obtain is, like any other expert opinion, to be treated as an item of evidence enabling the Sheriff to decide the question which the statute commits to his determination. Then I think that that construction is brought out all the more clearly when you contrast the clause in question with another clause providing for a remit to a medical referee. Where a question arises as to the condition of an injured workman, as regards his fitness for employment, the statute authorises a remit to a medical referee, and requires the referee not to report for the opinion of the arbitrator or committee, but to certify and give a certificate as to the condition of the workman and his fitness for employment, which certificate shall be conclusive evidence as to the matter so certified. I think the contrast between these two clauses makes it perfectly clear that when the Legislature intends the opinion of an expert to be conclusive, it says so, and when it does no more than enable the arbitrator to obtain the report of a medical referee for his own instruction, it says nothing to suggest a final decision by the referee.

As to the remit itself, I agree with your Lordship as to its construction and as to the specific questions it put to the referee; but I rather think it is an illustration of the extreme difficulty of the view which was maintained for the employers that an expert report is intended to be conclusive of the question, because I think it shows in a simple case the extreme difficulty of framing a remit in such terms as shall confine the expert's opinion to the simple question of skill upon which alone he is entitled to report. It is extremely difficult to send the whole evidence, as the Sheriff is entitled to do, to an expert and ask his opinion about it, and at the same time to separate his opinion on the pure question of medical fact from the inference which a Sheriff or a jury would be equally in a position to draw, as the result of the whole evidence, as to what the medical facts observed really are. The medical referee must take his facts at second-hand. There was no post-mortem examination; there was practically nothing proved about the previous history of the man; really the only evidence was the evidence of a medical man who had seen him in the last moments of his life; and the whole determining facts depend upon the weight which is to be given to that evidence. Now all that leaves the question of fact for the tribunal which has to decide it, and the opinion which is given by one additional expert is, to my mind, just an item of evidence like all the other evidence which the tribunal is bound to take into account. Now, taking all the evidence, the Sheriff finds in the most positive terms that the man died from a rupture of the left side of the heart caused by the strain resulting from the work in which he was engaged. That is a perfectly distinct finding that the death of the man resulted from the injury which he received in the course of and arising out of his employment. I entirely agree with your Lordship that it is not for us to say whether the evidence was sufficient to support that finding. That is a question for the Sheriff,

and I agree also that we cannot say that there was no evidence on which he was entitled to form an opinion one way or another. I think there was enough before him to make it his duty to decide the question of fact. He did decide it, and we cannot interfere with his decision.

LORD MACKENZIE concurred.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Find in answer to the first question in law in the case that the arbitrator is not bound to accept the medical referee's report as conclusive of the question which the Sheriff-Substitute had, as arbitrator, to decide under the statute: Refuse to answer the second question as stated: Affirm the determination of the Sheriff-Substitute as arbitrator: . . ."

Counsel for the Appellant—Constable, K.C.—Hon. W. Watson. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for the Respondents — J. A. Christie — T. G. Robertson. Agents — R. & R. Denholm & Kerr, Solicitors.

Saturday, February 11.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

KILMARNOCK PARISH COUNCIL *v.* STIRLING PARISH COUNCIL.

Poor — Settlement — Illegitimate — Minor Pubes — Forisfamiliation — Mother with no Residential Settlement.

An illegitimate child, who after puberty becomes a pauper, and who has not himself acquired a residential settlement, will, failing a residential settlement of the mother, take his own birth settlement, and not the birth settlement of the mother.

An illegitimate blind child was born on 12th March 1893 in the parish of Kilmarnock, and resided with her mother till she attained puberty. About a month thereafter, viz., on 7th April 1905, while still residing with her mother, she was sent to a school for the blind, where she remained till 3rd August 1907, when she was removed. She resided with her mother till 30th September 1908, when she (the daughter) became chargeable. The mother had acquired no residential settlement, and her birth settlement was Stirling.

Held (on the assumption that the child herself was the pauper) that the child's settlement was in the parish of her birth, Kilmarnock, and not in the parish of her mother's birth, Stirling.

The Parish Council of Greenock, *pursuers*, raised an action in the Sheriff Court at Kilmarnock against the Parish Council of Kilmarnock and the Parish Council of Stirling, *defenders*, for payment by one or other of them of advances made by the pursuers to Marion Campbell Mackie.

The following *narrative* of the *facts* is taken from the opinion of the Sheriff (Lorimer), and was adopted by the Lord President in the Inner House:—"Marion Campbell Mackie, the illegitimate blind daughter of Marion Campbell, was born on 12th March 1893 in Kilmarnock, and resided with her mother till she attained puberty on 12th March 1905. About a month after, viz., on 7th April 1905, while still residing with her mother in Edinburgh, she was, at the instance of the School Board of Edinburgh, sent for board and education to the Royal Blind School at West Craigmillar, under the provisions of the Blind and Deaf Mute Children (Scotland) Act 1890, where she remained till 3rd August 1907, when she was, at the instance of the authorities of that school, removed. She resided with her mother till 30th September 1908, when she (the daughter) became chargeable at Greenock, from which parish she received relief. She was then a minor of fifteen years of age. Her mother was, in April 1905, and has since continued, chargeable to Stirling, her birth parish. She resided in Edinburgh till the end of May 1907, and thereafter elsewhere, her daughter throughout being with her, and spending the school holidays with her while she was at Craigmillar."

The defenders, the Parish Council of Kilmarnock, pleaded, *inter alia*—"(1) The said Marion Campbell Mackie not being forisfamiliated she follows the settlement of her mother, which is in the parish of Stirling, and the defenders, the Parish Council of the Parish of Kilmarnock, should be assoilzied."

The defenders, the Parish Council of Stirling, pleaded, *inter alia*—"(1) The said Marion Campbell Mackie having been forisfamiliated on attaining the age of puberty, she takes her own birth settlement, which is in the parish of Kilmarnock, and the Parish Council of said Parish of Kilmarnock being responsible for her maintenance, the defenders, the Parish Council of the Parish of Stirling, ought to be assoilzied, with expenses."

On 8th December 1909 the Sheriff-Substitute (D. J. MACKENZIE) pronounced this interlocutor — "In respect that it is admitted (1) that the sums sued for have been expended by the pursuers on behalf of the pauper Marion Campbell Mackie; (2) that the said Marion Campbell Mackie is an illegitimate child, having been born at Kilmarnock on 12th March 1893; (3) that the birth settlement of her mother is in the parish of Stirling; (4) that the said Marion Campbell Mackie lived with her mother until she attained the age of puberty on 23rd March 1905; and (5) that about a month thereafter she was sent to the Royal Blind School at West Craigmillar, under the provisions of the Blind and Deaf Mute Children (Scotland) Act 1890, where she remained until 3rd August 1909, thereafter returning to live with her