would, I apprehend, require to be inaugurated by the Legislature, and not by the Judges of the Court of Session.

LORD KINNEAR and LORD MACKENZIE concurred.

The Court adhered.

Counsel for Pursuers and Respondents—Constable, K.C.—W. J. Robertson. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for Defenders and Appellants—Blackburn, K.C. — Mitchell. Agents—Dundas & Wilson, C.S.

Saturday, January 13, 1912.

SECOND DIVISION.

[Sheriff Court at Glasgow.

SPENCE *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Accident Arising Out of Employment—Heart Disease—Aggravation by Strain—Proof.*

In arbitration proceedings to recover compensation under the Workmen's Compensation Act 1906 the arbiter held it proved (1) that the claimant, while in the course of his employment lifting a derailed hutch, felt a sharp pain near the heart, followed by palpitation and shortage of breath; (2) that on being examined the claimant was found to be suffering from advanced disease of the heart, which was of long standing, was in its nature progressive, and bound to manifest itself sooner or later; and (3) that it was not proved that the lifting of the hutch accelerated the disease. *Held* that the arbiter was entitled to find that the claimant had not proved that he had sustained an accident arising out of and in the course of his employment within the meaning of the statute.

Clover, Clayton, & Company v. *Hughes*, [1910] A.C. 242, *distinguished.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) in the Sheriff Court at Glasgow, between William Spence, *appellant*, and William Baird & Company, Limited, *respondents*, the Sheriff-Substitute (THOMSON) dismissed the petition and stated a case for appeal.

The following *facts* were found proved or admitted—"(1) That the appellant was roadman and fireman in respondents' Bedlay Pit, Chryston, at a wage of 34s. 10d. a-week, that he had been employed there for about a year, and that he had been employed in similar work in coal pits for ten years or thereby immediately preceding. (2) That his ordinary daily duties involved, *inter alia*, the lifting and moving of loaded hutches from the lye at the back of the haulage wheel on to the rails of the haulage road, which was work requiring considerable physical exertion. (3) That the appellant on the morning of Friday, 20th May 1910, he being then alone, while lifting a derailed loaded hutch from the lye on to the haulage road, felt a sharp pain immediately above the stomach, followed by palpitation of the heart and a shortage of breath; that he lifted no more hutches that day, but remained till the end of the shift performing such light work as fireman as there was to do; that after a rest on the Saturday and Sunday (which were not working days for him) he resumed work on the Monday morning, and while in the act of moving a hutch he again experienced the same sensations as on the Friday. (4) That the appellant, however, adduced no direct evidence to corroborate his own statement that an accident had occurred on the Friday in lifting the hutches, but he consistently, when examined at the time and later by doctors on his own behalf and on behalf of the respondents, repeated his statement as to the sensations which he experienced in lifting the hutch, and his physical condition (to be immediately referred to) makes his statement quite probable. (5) That the appellant on being medically examined was found to be suffering from advanced disease of the mitral valve of the heart, with enlargement of the heart; that this condition was not due to the alleged accident but was of long standing, although possibly the appellant may not have been aware of the disease; that it was in its nature progressive and was bound to manifest itself sooner or later, and would do so probably in the way in which appellant describes, and might do so even when he was not engaged in active exercise. (6) That the appellant's condition has gradually become worse since 20th May 1910, and he is now permanently incapacitated for work as the result of the diseased condition of the heart. (7) That it is not proved that the lifting of the hutches on 20th May accelerated the progress of the disease."

On these facts the Sheriff-Substitute found that the appellant, even on the assumption that his statements as to his sensations were proved (as the Sheriff-Substitute held them to be), had not proved that he had sustained an accident arising out of and in the course of his employment with the respondents, and dismissed the petition.

The *question of law* for the opinion of the Court was—"Was the arbiter justified on the above facts in finding that the appellant had not proved an 'accident' within the meaning of the statute?"

Argued for the appellant—On the facts found by the arbitrator the appellant's incapacity was due to an aggravation or acceleration of the disease directly due to the physical exertion of lifting the hutch. There being no other evidence, the inference was that on 20th May 1910 the appellant suffered a strain, which was of course injury by accident—*Stewart* v. *Wilsons and Clyde Coal Company, Limited*, November 14, 1902, 5 F. 120, 40 S.L.R. 80—and that strain so aggravated or accelerated

a pre-existing disease as to produce incapacity. The incapacity therefore resulted from injury by accident—*Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242; *Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437; *M'Innes* v. *Dunsmuir & Jackson*, 1908 S.C. 1021, 45 S.L.R. 804. If necessary, the Court could remit to the arbitrator for information as to the medical evidence—*Borland* v. *Watson, Gow, & Company, Limited*, October 21, 49 S.L.R. 10.

Counsel for the respondents, who were not called on, mentioned the case of *Hawkins* v. *Powells' Tillery Steam Coal Company, Limited*, [1911] 1 K.B. 988.

LORD JUSTICE-CLERK—The Sheriff-Substitute sitting here as an arbitrator has found that it has not been proved that the injury from which this man suffered, and which has disabled him from work, was caused by an accident; and that being really a finding in fact, unless there are grounds in law for holding from the arbiter's statement that he could not find that in fact, we cannot interfere. I think that is well recognised in the cases which have been decided. The case of *Clover, Clayton, & Company* v. *Hughes*, [1910] A.C. 242, in which the majority of the House of Lords held that a man who was working with a spanner when an aneurism in his heart burst, had met with an accident, was an appeal against a decision finding in fact that it was an accident, and that distinguishes it very much from this case. There are other cases which have occurred, and I should like to refer to the Lord President's opinion in the case of *Coe* v. *The Fife Coal Company*, 1909 S.C. 393, in which he says, p. 395—"This is a stated case under the Workmen's Compensation Act, and the question put to us is whether an injury to a workman was due to an accident within the meaning of the Workmen's Compensation Act." That, of course, is a question of law, but his Lordship continues—"That seems to me to be primarily a question of fact, and therefore as usual we must see before we could interfere with the judgment of the Sheriff whether he has in some way drawn conclusions which cannot properly be drawn, or which are vitiated by wrong knowledge of the law from the particular facts which he found proved." Now that, I think, is just the position in which we stand in this case; and after going over the evidence the Lord President concludes—"It seems to me that the end of it all really comes to be a question of fact. Where so many have failed I certainly am not going to try to define what 'accident' is, but I can say without fear of being wrong that negatively 'accident' connotes something different from disease."

Now in this particular case the man who is asking compensation was a man who was suffering from an advanced disease in the mitral valve of the heart, and from enlargement of the heart, and it is found in fact that this condition was not due to the alleged accident but was of long standing, though possibly the appellant may not have been aware of the disease; that it was in its nature progressive and was bound to manifest itself sooner or later, and would do so probably in the way in which it did, and might do so even when he was not engaged in active exercise.

Now that seems to me to indicate a case where a man was suffering from a progressive disease which must sometime or other manifest such symptoms as he showed, and I cannot find in any of the findings of the Sheriff anything to show that they were produced by what he was doing at the time of the alleged accident. He was engaged in ordinary work; at a certain time while he was engaged in that work he felt this pain and shortage of breath, and he says that must have been from a strain which he received at that time. I do not see that there is any evidence of that, and I do not see that the Sheriff-Substitute finds that there was; on the contrary, his seventh finding negatives that view.

In these circumstances it seems to me impossible to say that the finding of the Sheriff-Substitute refusing compensation was wrong in point of law. He has not held it proved that the injury was caused by anything which happened in the employment; on the contrary, he has found that the appellant in this case has failed to prove that. In these circumstances it seems to me that if we sustained the appeal we would be interfering with the arbiter's finding in fact, which we have no right to do. Mr Mackay in the course of his speech repeatedly suggested that if we would only look at the evidence we might come to the opposite conclusion. That is not within our province. If the Sheriff-Substitute gives us a sufficient statement of the facts he found proved, and of the decision he came to, it cannot be interfered with on the ground that he has not decided the case correctly in fact. We are bound to accept the facts he has found proved, and his finding that certain facts are not proved. On these grounds I think we cannot interfere with his judgment. I think the proper course for us is to dismiss the appeal.

LORD DUNDAS—I entirely agree. No doubt the Courts have sometimes gone very far in these cases in favour of the workman, and probably rightly so, because these Acts were designed for the benefit of workmen; but I do think there is a very real danger of the Court going too far, such as was pointed out by Lord President Dunedin in the case of *Coe* v. *The Fife Coal Company*, 1909 S.C. 393, when he referred to a situation "where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it until at last you reach a point which, when the first decision was given, was probably not contemplated." I think that the facts in this case illustrate well the kind of point at which the Court ought to call a halt. No doubt what happened occurred in the course of the man's employment, but I cannot for myself see how it can be said to have been an

injury by accident arising out of the employment. At all events—and that is sufficient for the purpose—I am totally at a loss to see how it can be affirmed that the Sheriff-Substitute was bound so to find. The appellant's counsel naturally relied upon the well-known case of *Clover, Clayton, & Company* v. *Hughes*, 1910 A.C. 242, in the House of Lords—the "aneurism" case,—which probably went as far in this region of the law as any case that has yet been decided. But the facts there were not the same as the facts here; and it is important to observe that the decision of the majority (and it was a very narrow majority) was expressly put upon the view that there was evidence upon which the learned County Court Judge, upon a conflict of evidence, was entitled to hold as he did in favour of the workman. That view is not applicable here. The Sheriff-Substitute has held upon the facts that the man has not proved that he sustained an accident within the meaning of the statute; and among the facts, as your Lordships know, we have it that this man suffered from an advanced disease of the heart of long standing, which was bound to manifest itself sooner or later, and might do so even when he was not engaged in active exercise; that the duty of lifting these hutches was among his ordinary daily duties; and that it is not proved that the lifting of the hutches on 20th May 1910 accelerated the progress of the disease. In that state of the facts, it seems to me that this is really a clear case, and that we should not be right if we were to hold that the arbiter was not entitled to find as he did. I see no reason to doubt that the finding was correct, but at all events it seems to me impossible to say that it was not such as the arbiter was entitled upon the facts to arrive at.

LORD SALVESEN—I entirely agree. I think this is a very clear case indeed. It would have been a difficult case perhaps if the Sheriff-Substitute had decided the other way, but having come to the conclusion that there was no evidence that the progressive disease from which this man suffered had been in any way affected by the work in which he was engaged, it seems to me that he could come to no other result than that the man did not suffer injury by reason of any accident arising out of his employment.

LORD GUTHRIE—I agree. The appellant's argument depended upon three mistaken assumptions. The first is that the question raises the correct issue, whereas the proper question is not whether the arbiter was justified, but whether he was entitled, to find as he did. The second is that the appellant can make use of facts which the arbiter has not found in answer to difficulties put to him, which he could not answer without bringing in these facts, but although it is the practice of counsel, when hard pressed, to take this course, it is obvious that we cannot look at statements by medical men or by fellow workmen which the Sheriff-Substitute has not accepted. And third, the appellant seems to have mixed up pain and disease. There may have been excessive strain, and that may have produced pain. The question is, Did that contribute to the progress of the disease. But the Sheriff-Substitute has held on that question that it is not proved that the lifting of the hutches accelerated the progress of the disease. That seems to satisfy the test laid down by the Lord Chancellor when he says in the case of *Clover, Clayton, & Company*, p. 247, that the question is, "Did he die from the disease alone or from the disease and employment taken together, looking at it broadly. Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

I therefore agree that the question should be answered as your Lordship proposes.

The Court answered the question of law by declaring that the arbitrator was entitled to find on the facts stated that the appellant had not proved an accident within the meaning of the statute.

Counsel for the Appellant—Watt, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

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

Saturday, January 20.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

COPELAND *v.* WIMBORNE.

Process—Reclaiming Note—Review—Prior Interlocutor—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 28 *and* 52—*Act of Sederunt* 10*th March* 1870, *sec.* 1, *sub-sec.* 3, *and sec.* 2.

An interlocutor allowing a proof by writ or oath was not reclaimed against within six days.

Held that it did not become subject to review on the presentation of a reclaiming note against a subsequent interlocutor.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), enacts, section 28—"Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section (*dealing with the procedure after Record closed, and Adjustment of Issues*) . . . shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily. . . ." Section 52—"Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date