[HIGH COURT OF AUSTRALIA.]

McGUIRE . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *April* 9, 13, 14.

MELBOURNE, *June* 14.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Workmen's Compensation—"Injury by accident"—Winchman working long shift—Conditions of employment usual—Sudden attack of shivering—Pneumonia supervening—Unexpected result—Finding of arbitrator—Workmen's Compensation Act 1916 (*N.S.W.*) (*No.* 71 *of* 1916), *sec.* 5.

Sec. 5 of the *Workmen's Compensation Act* 1916 (N.S.W.) provides that "(1) 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, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Schedule One."

On the hearing of a claim for compensation under sec. 5 (1) the arbitrator, a District Court Judge, found the following facts:—The claimant, a winchman, who was in his usual good health, at 8 o'clock on a winter's morning commenced to work a twenty-four hours' shift at an electric winch on an open ship's deck; such a shift was not an unusual task for a man in the particular employment; the following night was cold and almost still; at half-past six o'clock in the morning of the following day the claimant had an attack of cold shivers and went home and to bed; the following day he had developed pneumonia, and, having previously sustained an injury to his elbow, the pneumonic germ attacked the injured spot and his arm was rendered so useless that he was for the time being totally incapacitated from work. The arbitrator found that the injury arose out of and in the course of his employment, but held, as he thought he was bound by law to hold, that the injury was not an "injury by accident."

Held, by *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ., that the facts found established that the injury was an "injury by accident," and that the claimant was entitled to compensation.

Per Knox C.J.: Upon the findings of fact of the arbitrator it was open to him to further find that the injury either was or was not an "injury by accident," and the case should, therefore, be remitted to him to find as a fact whether it was or was not an "injury by accident."

Decision of the Supreme Court of New South Wales: *Maguire* v. *Union Steamship Co. of New Zealand*, 19 S.R. (N.S.W.), 279, reversed.

APPEAL from the Supreme Court of New South Wales.

A claim having been made by Alexander McGuire against the Union Steamship Co. of New Zealand Ltd., under the *Workmen's Compensation Act* 1916 (N.S.W.), for compensation for personal injury by accident arising out of and in the course of his employment by the Company, and a question having arisen as to the liability of the Company to pay compensation under the Act in respect of the alleged injury, an arbitration took place before a District Court Judge for the settlement of the question. At the hearing it was admitted by the Company that McGuire's wages were £3 15s. a week, and that he was then totally incapacitated. The District Court Judge, having heard evidence, made an award in favour of the Company; and his findings of fact and the reasons for his award are set out in the judgment of *Knox* C.J. hereunder. From the decision of the District Court Judge, McGuire appealed to the Supreme Court, and the Full Court by a majority (*Sly* and *Owen* JJ., *Ferguson* J. dissenting) dismissed the appeal: *Maguire* v. *Union Steamship Co. of New Zealand* (1).

From the decision of the Full Court McGuire now, by special leave, appealed to the High Court.

Monahan, for the appellant.

Broomfield K.C. and *Halse Rogers*, for the respondent.

[During argument the following authorities were referred to: *Fenton* v. *J. Thorley & Co.* (2); *Clover, Clayton & Co.* v.

(1) 19 S.R. (N.S.W.), 279.

(2) (1903) A.C., 443.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Hughes (1); *Glasgow Coal Co.* v. *Welsh* (2); *Warner* v. *Couchman* (3); *Trim Joint District School Board of Management* v. *Kelly* (4); *Brintons Ltd.* v. *Turvey* (5); *Innes* v. *Kynoch* (6); *Ismay, Imrie & Co.* v. *Williamson* (7); *Sheerin* v. *Clayton & Co.* (8); *Maskery* v. *Lancashire Shipping Co.* (9); *Morgan* v. *Owners of the Zenaida* (10); *McMillan* v. *Singer Sewing Machine Co.* (11); *Stuart* v. *Christchurch Tramway Board* (12); *Pyper* v. *Manchester Liners Ltd.* (13); *Eke* v. *Hart-Dyke* (14); *Lyons* v. *Woodilee Coal and Coke Co.* (15); *Broderick* v. *London County Council* (16); *Martin* v. *Manchester Corporation* (17); *Dennis* v. *A. J. White & Co.* (18); *Alloa Coal Co.* v. *Drylie* (19); *Coyle* v. *John Watson Ltd.* (20).]

Cur. adv. vult.

June 14. The following judgments were read :—

KNOX C.J. The appellant claimed from the respondent compensation under sec. 5 (1) of the *Workmen's Compensation Act* 1916, which reproduces sec. 1 (1) of the Imperial Act 6 Edw. VII. c. 58. The claim, being disputed, came before *Scholes* D.C.J., whose findings, so far as they are material to the question raised by this appeal, are as follows :—" (*a*) The workman, who was in his usual good health and who was a winchman, commenced a twenty-four hours' shift at an electric winch at 8 a.m. on the morning of 17th July last, and worked with the usual breaks till 6.30 a.m. on 18th July. (*b*) The night of the 17th-18th was cold with a very light breeze, almost still. (*c*) The deck and the winch at which the workman worked were uncovered. (*d*) The long shift was not an unusual task for a man in that employment. (*e*) At 6.30 a.m. on the 18th the workman had an attack of 'cold shivers,' and he went home and to bed. (*f*) On the 19th his medical adviser sent him to the

(1) (1910) A.C., 242.
(2) (1916) 2 A.C., 1.
(3) (1911) 1 K.B., 351, at p. 356.
(4) (1914) A.C., 667, at p. 674.
(5) (1905) A.C., 230.
(6) (1919) A.C., 765.
(7) (1908) A.C., 437.
(8) (1910) 2 I.B., 105.
(9) 7 B.W.C.C., 428.
(10) 2 B.W.C.C., 19.
(11) 6 B.W.C.C., 345.
(12) 17 N.Z. Gaz. L.R., 391.
(13) (1916) 2 K.R., 691.
(14) (1910) 2 K.B., 677.
(15) 86 L.J. P.C., 137; 117 L.T., 65; 10 B.W.C.C., 416.
(16) (1908) 2 K.B., 807.
(17) 28 T.L.R., 344.
(18) (1917) A.C., 479, at pp. 483, 492.
(19) 6 B.W.C.C., 398.
(20) (1915) A.C., 1.

hospital, and diagnosed definite pneumonia. (*g*) The workman had, some eighteen months previously, suffered an injury to his elbow; the pneumonic organism attacked that injured spot, an operation upon the elbow was performed, and his arm is now so useless as to render the workman for the present totally incapacitated from work." The learned District Court Judge, having stated his findings, then said:—"The question is whether or not on these facts 'personal injury by accident arising out of and in the course of the employment' was caused to this workman. I imagine that it will be conceded that personal injury arising out of and in the course of the employment was caused to the workman. The personal injury must by virtue of the Statute be 'by accident.' This workman, working a long shift through the night in an exposed place, contracted a chill which developed into pneumonia, and he is incapacitated. Is this 'injury by accident'? In 1905, in *Brintons Ltd.* v. *Turvey* (1), Lord *Robertson* said: 'Colloquially, and accurately, we say that So-and-So accidentally caught cold or any other disease, and yet no one would think of saying that he had met with an accident.' In *Eke* v. *Hart-Dyke* (2) Lord Justice *Kennedy* rejects the suggestion that a man catching cold had met with an accident. In 1912, in the case of *McMillan* v. *Singer Sewing Co.* (3), it was held not to be 'personal injury by accident' when a canvasser, hurrying to get his work done in time, contracted a chill which developed into pleurisy. I think this case is distinguishable from the case of *Alloa Coal Co.* v. *Drylie* (4) in that there the 'personal injury' was directly traceable to the 'accident' of the pump being defective causing an overflow of cold water. In my opinion the personal injury claimed for in this arbitration is not 'by accident,' and, therefore, I make an award in favour of the respondent."

The only question raised by this appeal is whether the appellant suffered "injury by accident" within the meaning of the section above referred to. An examination of the authorities cited in the course of the argument leads me to the conclusion that it must now be taken as settled by a long series of decisions that "injury by

(1) (1905) A.C., at p. 236.
(2) (1910) 2 K.B., 677.
(3) 6 B.W.C.C., 345; (1913) S.C., 575.
(4) (1913) 6 B.W.C.C., 398.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

KNOX C.J.

accident" means "accidental injury," and that an injury may be said to be accidental whenever it is the result of an unexpected occurrence or of the unexpected nature of the operation of an occurrence in producing the injury. Apart from the decision of the House of Lords in *Lyons* v. *Woodilee Coal and Coke Co.* (1), which was pressed on us by counsel for the respondent, I should feel no difficulty in coming to the conclusion that the learned District Court Judge was in error in holding, as it appears to me he did hold, that he was precluded in law from deciding that the injury sustained by the appellant was an "injury by accident." The facts of that case are thus stated in the head-note to the report in *Butterworth's Workmen's Compensation Cases* (2) :—"A brusher, having finished his night's work, went to the pit shaft to be taken to the surface, just at the time when the daily statutory inspection of the shaft was beginning. Usually the inspection took about half an hour, but that morning, owing to a break-down of the bell wire, it took over an hour. During all that time the workman was standing about and caught a chill which developed into pneumonia, from which he died. There was no stated time for brushers on the night shift to leave off work, and except during the inspection of the shaft, they were at once sent to the surface. The arbitrator found that, although the cause of the man's death arose out of and in the course of his employment, nevertheless it was not due to an 'accident.' The time when the daily inspection of the shaft took place was known to the workman, and he had chosen to break off work just at the time when the inspection was taking place, and the unusual delay caused by the breaking of the bell wire was too remote a cause for the delay to complete the chain of causation. He, therefore, made his award in favour of the respondents." On these facts the arbitrator found that the death of the claimant was not due to an accident arising out of and in the course of his employment. It appears from the report in the *Law Times* (3) that counsel for the claimant put his case thus :—"The break-down of the bell wire, the consequent unusual delay, and the resultant prolonged exposure causing chill, upon which pneumonia and death supervened, caused an

(1) 10 B.W.C.C., 416; 117 L.T., 65.
(2) 10 B.W.C.C., 416.
(3) 117 L.T., at p. 66.

unbroken chain of causation. But, assuming that the break-down was not in the sense of the Act the accident which caused the injury, at any rate the unusual delay must be regarded as the accident. Alternatively, the accident was the miscalculated effect of the prolonged exposure to the draught. Avowedly the arbitrator placed this case in the category of which *McLuckie* v. *John Watson Ltd* (1) is an example. But it is distinguishable from that case on every material particular." In delivering judgment Lord *Loreburn* L.C. said that he could not say that there was no evidence which would reasonably warrant the conclusion at which the arbitrator had arrived, and Lord *Shaw* added that, looking on the case in its entirety, he saw no reason to suggest to his mind that the learned Sheriff did not come to a correct finding.

I cannot find any substantial distinction between the facts of that case and the facts of the case now under consideration. In each case the workman caught a chill which developed into pneumonia, in each case the chill was caused by prolonged exposure during the employment of the workman, and in each case the arbitrator found that the injury arose out of and in the course of the employment. It appears to me that, if this appeal had come before the same tribunal which decided that case, the decision would have been the same, viz., that the arbitrator having found that the injury was not an "injury by accident" his decision must stand. It is true that in the present case the learned District Court Judge apparently thought that he was precluded by decisions binding on him from holding that the injury was an injury by accident, and that in *Lyons's Case* (2) the arbitrator appears to have found as a fact that the injury was not caused by accident, but it seems to me to follow from the decision in that case that in the present case it was open to the learned District Court Judge to find as a fact that the injury was not caused by accident.

I find myself unable to reconcile the decision in *Lyons's Case* (2) with what I regard as the settled rule, that injury by accident means neither more nor less than accidental injury as defined above. Under these circumstances I think I am bound to be guided by what I believe to be the settled rule to be deduced from a long series of

(1) 6 B.W.C.C., 850; 50 S.L.R., 770. (2) 10 B.W.C.C., 416; 117 L.T., 65.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

KNOX C.J.

decisions rather than to treat the decision in *Lyons's Case* as governing this case. I am therefore of opinion that the learned District Court Judge was in error in deciding that it was not open to him to hold on the facts of this case that the injury sustained was injury by accident within the meaning of the Act. As I read the decision of the learned District Court Judge it appears to me that he did not apply his mind to the determination of the question whether the injury was in fact accidental within the meaning attributed to that word by the House of Lords in *Fenton* v. *J. Thorley & Co.* (1), as explained by Lord *Macnaghten* in *Clover, Clayton & Co.* v. *Hughes* (2).

The question whether the injury sustained was accidental is a question of fact, and in the view I take it was the duty of the learned District Court Judge to decide this question, and he has not done so. I cannot satisfy myself from the findings of the learned District Court Judge that he would certainly have decided as a fact that the injury was accidental, if he had felt that he was at liberty to do so, nor do I think that upon the facts found by him it would not be open to him to find as a fact that the injury was not accidental.

Under these circumstances I think the proper course for this Court to adopt is to remit the matter to the District Court Judge in order that he may decide as a fact whether the injury was or was not accidental.

ISAACS AND RICH JJ. (read by ISAACS J.). The question we have to determine is whether on the facts found by the District Court Judge, the personal injury sustained by the appellant was an " injury by accident " within the meaning of the *Workmen's Compensation Act* 1916 of New South Wales.

That Act is, for present purposes, identical with the English Act of 1906. Local adaptations leave unaffected the particular provisions we have to construe and apply. Its genesis is practically identical. English decisions are, therefore, in point. Many of them are discordant, and some are irreconcilable even where not expressly overruled. It cannot be said that the enactment is unambiguous ; the prolonged and strenuous argument we have had,

(1) (1903) A.C., 443. (2) (1910) A.C., at pp. 247-248.

notwithstanding the House of Lords' cases, is convincing proof of that. The argument covered a wide field. It investigated the inherent meaning of the word " accident," its meaning in its setting in this Act, apart from the decisions; it questioned the real meaning of the House of Lords' decisions, with special reference to Lord *Macnaghten's* classical exposition in *Fenton* v. *J. Thorley & Co.* (1); it gave special prominence to the case of *Lyons* v. *Woodilee &c. Co.*, particularly as reported in the *Law Times* (2), as indicating a limit to the generality of Lord *Macnaghten's* expressions in *Fenton's Case*, even if his words were otherwise to be read as broadly as they primarily suggest. It is therefore clear that the case is a very important one, and will guide future decisions in Australia.

The learned District Court Judge (Judge *Scholes*) found the facts very fully and distinctly, but held—apparently on his reading of three decisions quoted by him—that the facts so found did not in law amount to " injury by accident " within the meaning of the Act. In other words, he arrived at his final conclusion upon his construction of the Act. On appeal the Supreme Court of New South Wales, by a majority, upheld that construction—*Ferguson* J. dissenting. *Sly* J. was of opinion that as there was nothing abnormal in the employment or the event causing the chill, the injury was not " by accident." *Owen* J. seems to have rested his decision on the same ground, holding that as a matter of law, where a workman of normal health was working in an exposed position and running the risk of catching a chill, it could not be said in case he did catch a chill that there was any untoward event which resulted in the injury. *Ferguson* J. held that abnormality of conditions is immaterial on the question of " accident," and that the real question was whether the mishap of contracting the chill was unexpected and, perhaps, sudden—provided, of course, that it arose out of and in the course of the employment. The authorities were fully cited, and it is our duty to consider which construction is correct.

We think it is correct to say that the present case carries, not the interpretation, but the application, of the law further than any of the reported decisions, unless we except *Sheerin* v. *Clayton & Co.* (3),

(1) (1903) A.C., 443. (2) 117 L.T., 65.
(3) (1910) 2 I.R., 105.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

and consequently we think it all the more desirable that our reasons for the conclusion at which we arrive should be explicitly stated. It seems to us that in the circumstances it will be more satisfactory if, in determining the construction of the Act, regard is had to three great factors which are always legitimate considerations where there is an admitted or alleged ambiguity in an enactment. One is the fabric of the law—common law and Statute law—that lies behind it, and which it was intended to modify or supplant; the next is its history; and the third is the broad character of the enactment itself, read and considered as a whole. The first factor points to the evils intended to be met; the second is a guide to the interpretation of the terms adopted by the Legislature, and the third materially aids by the context in the construction of any particular part.

First, with regard to the law. Until 1837 the obligation of an employer in respect of the safety of his employees had not received any judicial standard. In that year *Priestley* v. *Fowler* (1) laid down, or has been supposed to lay down, the principle that apart from special contract or negligence of the employer himself, personal or imputable, an employee (unlike a stranger) had no claim upon him for injuries sustained in his service, even though they arose through the negligence of another employee selected by the employer if he was engaged in the same common service. This was followed in several cases, including the *Bartonshill Coal Co. Cases* in the House of Lords (2) in 1858. There reference was made by Lord *Cranworth* (3) to the celebrated judgment of *Shaw* C.J. in *Farwell* v. *Boston and Worcester Railroad Corporation* (4) in 1842. Lord *Cranworth* recognized that judgment as expressing the English common law. See, also, *Palles* C.B. in *Waldron* v. *Junior Army and Navy Stores* (5). In *Farwell's Case* there is a passage which contains the initial doctrine of the law we are considering. *Shaw* C.J., speaking of the employee's contract of service, said (6):—"It was a voluntary undertaking on his part, with a full knowledge of *the risks incident to the employment*; and the loss was sustained by means of an *ordinary casualty*, caused

(1) 3 M. & W., 1.
(2) 3 Macq., 266-315.
(3) 3 Macq., at p. 297.
(4) 4 Metc. (Mass.), 49; 3 Macq., 316.
(5) (1910) 2 I.R., 381, at p. 384.
(6) 3 Macq., at p. 319.

by the negligence of another servant of the Company. Under these circumstances, the loss must be deemed to be the result of a *pure accident*, like those to which all men, in all employments and at all times, are more or less exposed; and like *similar losses from accidental causes*, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion." *Coldrick* v. *Partridge, Jones & Co.* (1) is a very modern illustration. It is, we think, of the first importance, in relation to the matter in hand, to observe that the word "accident" in the passage quoted from *Farwell's Case* (2) does not refer to what may be called the concrete occurrence itself, which was the cause of the injury, but refers, so to speak, to the abstract quality of that occurrence. The occurrence itself was treated as the cause of the injury, but "accident" and "accidental" are used as attributives of the occurrence. The same occurrence, if imputable to the employer himself, would have made him responsible, but its accidental nature, its quality of "pure accident" as contradistinguished from the employer's negligence, made it "a risk incident to the employment," and this the employee was bound to bear *entirely*. We emphasize the word "entirely." The passage quoted, which, when later English decisions are examined, is, through the repetition of the words by Lord *Cranworth*, the source of at least one expression that has gained currency in our law, was avowedly based, as was the former decision of *Priestley* v. *Fowler* (3), on what Judges considered reasons of public policy. It was for reasons of policy and expediency as they commended themselves to the judicial mind in 1837 and 1842 and 1858, that the implication of contractual obligation between employer and employee did not extend to include the ordinary maxim *Qui facit per alium facit per se*.

An injury occurring through the negligence of a fellow servant was therefore treated, as regarded an injured employee, as a "pure accident," simply because it was deemed to arise from one of the incidental risks of the employment, and not from the master's negligence. In 1880 this was altered by the *Employer's Liability Act*, of which it is sufficient here to say that its main effect was in

(1) (1910) A.C., 77.
(2) 4 Metc. (Mass.), 49; 3 Macq., 316.
(3) 3 M. & W., 1.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

certain stated circumstances to place the injured employee in the position of a stranger and to exclude the defence of common employment (*Thomas* v. *Quartermaine* (1)). It also to some extent operated in favour of the employer, but that is not so important here, though it is not improbable the idea was carried into the later Act. But even the amelioration of the workman's position created by the *Employer's Liability Act* left him under serious practical disabilities. In 1889 an instance is recorded. In *Harris* v. *Tinn* (2) a workman was seriously injured in an iron rolling mill. He sued under the Act, and obtained a verdict and judgment. On appeal, however, the judgment was set aside, as the foreman, whose act had caused the injury, was not negligent. There Lord *Coleridge* C.J., who apparently thought the case a very hard one, used the word "accident" in two senses: first as the concrete occurrence, and next in the phrase "*a pure accident*," the latter being identical with that of *Shaw* C.J. *Lindley* L.J. in the Court of Appeal, in *Smith* v. *Baker & Sons* (3), expressed himself in the latter sense ("*pure accident* without any element of negligence"): see Lord *Watson's* judgment in that case (4). Another formidable disability manifested itself about the same time, practically started by the judgment of *Bowen* L.J. in *Thomas* v. *Quartermaine*, the doctrine of *Volenti non fit injuria*. No doubt the House of Lords in *Smith* v. *Baker & Sons* restricted the application of that doctrine, but they affirmed its existence, and reaffirmed (5) the principle that the burden of risking incidental dangers of the employment rested on the workman and not on the employer.

Next, as to the history of the measure. The pressure of the disabilities of workmen was constantly increasing. The advancing complication of industry in many occupations vitally altered in practice the relative positions of employer and workman. In connection with another but cognate branch of the law, we have recently made reference to this change. See *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (6). We also there referred to the final report of the Royal

(1) 18 Q.B.D., 685, at p. 700.
(2) 5 T.L.R., 221.
(3) (1891) A.C., 325.
(4) (1891) A.C., at p. 349.
(5) (1891) A.C., at p. 356.
(6) 26 C.L.R., 508, at pp. 555-556.

Commission to be found in the *House of Commons Papers* for 1894, vol. xxxv., pp. 9 *et seqq.* That Commission took evidence, not merely as to causes of trade disputes, but also as to the dissatisfaction among workmen with relation to the obligations of their employers for their safety and in case of injury. Some of the evidence went to show that workmen's organizations existed for insuring the members against risks of their employment, and that in some cases employers contributed to the accident funds. Appendix V. of the Report (pp. 556-557) is headed "Memorandum on the Evidence relating to Employers' Liability." Part I. of the Appendix is "What the law is"; and Part II., "How the law works." The statement of existing law is valuable as evidencing the popular meaning of the word "accident" in connection with the subject matter, because, although the Commission (the representative character of which can, to some extent, be seen at p. 559 of 26 C.L.R.) expressed no opinion on the general policy, they united in adopting the Appendix. The Imperial Parliament had that statement before it when shortly afterwards it legislated on the subject. After stating in various paragraphs the general law as to actions for negligence, the Appendix proceeds, in par. 809, to refer to the absence of the employer's responsibility at common law for his workman's negligence where the plaintiff is also a workman in the same employment as the negligent workman. In par. 810 it is pointed out that the doctrine of common employment is of quite recent origin. Then, in par. 811, this is stated: "In an action for negligence, brought by a workman against his employer, the defences, therefore, are—(*a*) no negligence, but *accident*; (*b*) acquiescence; (*c*) contributory negligence; (*d*) common employment." Par. 817 indicates the hardships on workmen notwithstanding the *Employer's Liability Act*. In 1896 a Trade Disputes Act (*Conciliation Act* 1896) was passed, and in 1897 the first English *Workmen's Compensation Act* was enacted. The Act was limited to certain employments, extended in 1900 to agriculture, and finally in 1906 (after *Fenton* v. *J. Thorley & Co.* (1), in 1903, and *Brintons Ltd.* v. *Turvey* (2), in 1905, be it observed) the enactment was extended, generally speaking, to all employments. The Act, as originally intituled, referred to "Compensation to workmen for

(1) (1903) A.C., 443. (2) (1905) A.C., 230.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

accidental injuries suffered in the course of their employment." In the 1906 Act the word "accidental" is omitted, and the New South Wales Act follows in this respect the Act of 1906. That represents the relevant history of the English legislation, and in Australia the material elements of that history are identical.

The third factor to which we have alluded is the broad character of the enactment. Lord *Macnaghten* said of it, in *Fenton's Case* (1): "Parliament is making a new departure in the interest of labour." Of the character of that departure there can be no question. It revolutionized the relation of the employer and workman in the industries to which it applied. It reversed, *pro tanto*, the purely arbitrary notion of public policy that Judges had formulated and acted upon, a notion which *Neville* J. has severely criticized in *Hayward* v. *Drury Lane Theatre and Moss' Empires* (2). It was a distinct step in that process of change in the position of industrialists which we described in the *Municipal Employees' Case* (3) as from "one of pure contract to one of status." It eliminated fault or contract as the basis of responsibility. It did not give "damages," but a limited "compensation" (*Victor Mills Ltd.* v. *Shackleton* (4)). It did not provide for a "litigation," but an "arbitration" to ascertain the facts and settle the amount. As *Farwell* L.J. said of the Act of 1897 in *Darlington* v. *Roscoe & Sons* (5), the obligation of the employer was "a newly imposed statutory duty—a duty which is wholly independent of any wrongdoing by the party to be charged, but is made by Statute part of every contract of employment to which the Act applies"; and again: "it is neither tort nor contract, but a statutory duty." This view is supported by the very recent decision of the Privy Council in *Workmen's Compensation Board* v. *Canadian Pacific Railway Co.* (6). *Farwell* L.J. also quoted Lord *Robertson*, in an earlier case, to show that the proceedings contemplated by the Act are not primarily judicial proceedings. And above all it must be borne in mind that while it eliminated wrongdoing in any form as the basis of claim, and also eliminated the defences—if such an expression as "defence" is appropriate to such a proceeding

(1) (1903) A.C., at p. 447.
(2) (1917) 2 K.B., 899, at p. 915.
(3) 26 C.L.R., at p. 555.
(4) (1912) 1 K.B., 22.
(5) (1907) 1 K.B., 219, at p. 230.
(6) (1920) A.C., 184, at p. 191.

—of common employment and assumption of risk, it did not throw the entire burden on the employer. *That burden, by reason of the limitation of compensation, is shared by the employer and the workman, as co-operators in their common enterprise.* That is a tacit adoption of status as the basis. In *Johnson* v. *Marshall, Sons & Co.* (1) Lord *James of Hereford* said :—" The main object was to entitle a workman who sustained injury whilst engaged in certain employments to recover compensation from the employer, although he (the employer) was guilty of no default. The intention was to make 'the business' bear the burthen of the accidents that arose in course of the employment, and relief from this liability is not found even if the injured workman be guilty of negligence. The doctrine of contributory negligence was superseded by the Act." In *Brintons Ltd.* v. *Turvey* (2) Lord *Halsbury* L.C. said that " apart from negligence of any sort—either employers or employed— the industry itself should be taxed with an obligation to indemnify the sufferer for what was 'an accident' causing damage." The same economic view is stated by the Supreme Court of Massachusetts (*Duart* v. *Simmons* (3)). Having in view the nature of the Act, it should not be construed in any narrow spirit (per Lord *Loreburn* L.C. in *Low* v. *General Steam Fishing Co.* (4) and in *Trim Joint District School Board of Management* v. *Kelly* (5).

Approaching the question we have to decide, with these considerations in mind, the directly relevant provision is sec. 5, sub-sec. 1, which both in England and in New South Wales runs 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, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule "—" Schedule One" in the New South Wales Act. That sub-section is plainly modelled, as to form, on insurance precedents. See, for instance, the language of *Alderson* B. in *Theobald* v. *Railway Passengers Assurance Co.* (6) as to " in the course of " and " arising out of " in relation to a railway accident. It has been judicially recognized as akin to insurance. See per *A. L. Smith* L.J. in *Smith* v. *Lancashire*

(1) (1906) A.C., 409, at p. 412.
(2) (1905) A.C., at p. 233.
(3) 231 Mass., 313, at p. 319.
(4) (1909) A.C., 523, at p. 532.
(5) (1914) A.C., at p. 682.
(6) 10 Exch., 45, at p. 58.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

and Yorkshire Railway (1) and per Lord *Haldane* L.C. in the *Trim Case* (2). Sir *Frederick Pollock*, who was a member of the Royal Commission and of those who adopted Appendix V., says in his work on *Torts*, 10th ed., at p. 113, after referring to *Darlington* v. *Roscoe & Sons* (3), that "in practice the real defendant is almost always an insurance company."

Having regard to the context, the history of the legislation, and the general scheme of the Act, it would, in our opinion, be unduly narrowing the meaning of the word "accident" to restrict it always to some event of an abnormal nature, or to limit it to some event preceding the injury in point of time, distinct and separately recognizable in itself as an event, and detached or detachable from the injury itself—"segregated," to use Lord *Johnston's* word in *Glasgow Coal Co.* v. *Welsh* (4)—an event which might or might not be attended with injury, but in respect of which, if injury happens to follow, a claim arises. Such a restriction or limitation seems to us to narrow the primary meaning of "accident," to depart from the scope and spirit of the legislation, and to fall short in a large measure of the object openly aimed at by the Act. And this, for no reason that we can discover. As a remedial Act, such a construction is all too narrow. According to the express words of the enactment it is to provide for risks "arising out of the employment," which is a somewhat larger term than "incidental to the employment." That narrower expression, as Lord *Loreburn* points out in the *Trim Case* (5) "does not mean *merely* risks which ordinarily occur in it," but it certainly includes such risks. And, having regard to the nature of the evils to be met and the language employed to meet them, it seems to us the narrower construction originally placed upon the Act, and still in effect maintained in the judgment appealed against, is impossible of acceptance. At an early period the view was held that the word "accident" connoted some "fortuitous" element, in the sense of "abnormal" having regard to the ordinary course of the employment, an exclusion of everything ordinarily within the range of incidental risk. In *Hensey* v. *White* (6) it was so decided, and *Collins* L.J. considered there must be something which, entering into the circumstances,

(1) (1899) 1 Q.B., 141, at p. 143.
(2) (1914) A.C., at pp. 678-679.
(3) (1907) 1 K.B., 219.
(4) 52 Sc. L.R., 798.
(5) (1914) A.C., at p. 682.
(6) (1900) 1 Q.B., 481.

"turned a normal condition of affairs into a catastrophe." That is exactly what the majority of the Supreme Court of New South Wales held in this case. But in *Fenton's Case* (1) that was held to be wrong, and it was held that "injury by accident" meant simply "accidental injury." Lord *Macnaghten's* exposition (which has now practically the force of an Act of Parliament) seems to us to be clearness itself. It is needless to repeat his words, but we state his opinion in analytical form. It was: (1) the expression "injury by accident" is a compound expression, the words "by accident" qualifying the word "injury"; (2) the words "arising out of and in the course of the employment" qualify neither the word "injury" alone, nor the word "accident" alone, but the whole compound expression "injury by accident"; (3) "accident" and "injury," that is "injury by accident," are used where notice is spoken of, as convertible terms; (4) "accident" therefore is used as denoting "an unlooked-for mishap or untoward event which is not expected or designed." In the first place, there is not a word about "abnormality." His Lordship rejects "fortuitous" so far as it denotes anything beyond "accidental," and then it is superfluous where that word is used. In the next place, segregation of accident and injury in the statutory sense is negatived. And *Hensey* v. *White* (2) is declared to be wrong.

The House of Lords has repeatedly reaffirmed the correctness of that exposition. Substantially, every subsequent case on the subject in the House of Lords has been a decision against any limitation of the force of Lord *Macnaghten's* words properly understood, and in some cases there has been a distinct application of them to mishaps through the effect of ordinary work of the sufferer. We say "substantially" because the effect of *Lyons* v. *Woodilee Coal and Coke Co.* (3) has to be considered. In *Brintons Ltd.* v. *Turvey* (4) it was urged that though a "rupture" was an "accident," the inoculation of a man's eye with anthrax bacillus was not. The House (Lord *Robertson* dissenting) held the case one of accident. There Lord *Macnaghten* again, by a series of phrases, indicated what "accident" means—phrases which, if anything were needed to make clearer his former

(1) (1903) A.C., 443.
(2) (1900) 1 Q.B., 481.
(3) 117 L.T., 65.
(4) (1905) A.C., at p. 231.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

exposition, effectually do so. This case has one special point of interest. Lord *Robertson* thought that Lord *Macnaghten's* exposition of "accident" in *Fenton's Case* (1) was obiter only, and observed that that learned Lord had been "so enterprising as to hazard a definition." Lord *Macnaghten* himself, not only in *Brintons Ltd.* v. *Turvey* adhered to and amplified what he had said in *Fenton's Case*, but in a later case (*Clover, Clayton & Co.* v. *Hughes* (2)) made a distinct reference to Lord *Robertson's* observation. But it is most important to note that it was after *Brintons Ltd.* v. *Turvey*, which applied the wide interpretation to the provision, that the Statute was not merely re-enacted but was extended substantially to all employments. In *Ismay, Imrie & Co.* v. *Williamson* (3) the House, by a majority, held that, *the ordinary work* of a stoker having suddenly overcome a workman in a weak condition of health, an accident had occurred. Lord *Macnaghten* dissented really on the facts, holding that the evidence led only to one conclusion, namely, that in such a physical condition the result to the stoker was only to be expected, and, therefore, could not be accidental. His reasoning in that case and his decision in the next show that he did not rest upon the doctrine of "abnormality" or "exceptional conditions." His dissent, however, makes the conclusion of the Lord Chancellor and Lord *Ashbourne* all the more striking. Lord *Loreburn*, referring to the workman's prostration and death from the heat stroke, said (4) it was "an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death."

In *Clover, Clayton & Co.* v. *Hughes* (2) the House of Lords reiterated that "injury by accident" means simply "accidental injury." It was held that where, as the effect of mere *ordinary work*, an aneurism burst, unexpectedly so far as the workman was concerned, and the man died, that was an accident, and one arising out of the employment. Lord *Loreburn* L.C. held Lord *Macnaghten's* exposition in *Fenton's Case* (1) as conclusive. Lord *Macnaghten* himself adhered to it, and said (5) "'injury by accident' meant

(1) (1903) A.C., 443.
(2) (1910) A.C., 242.
(3) (1908) A.C., 437.
(4) (1908) A.C., at p. 439.
(5) (1910) A.C., at p. 248.

nothing more than 'accidental injury' or 'accident,' as the word is popularly used." He added, with evident reference to what Lord *Robertson* had said in *Brintons Ltd.* v. *Turvey* (1): "It is not perhaps quite accurate to say that in that case" (that is, *Fenton's Case*) "a definition of the term 'accident' was hazarded." He went on to observe that the decision was that "accident" was used in its ordinary popular sense, and that sense was stated. Lord *Collins*, who had been party to *Hensey* v. *White* (2), was one of the majority. *Trim Joint District School Board of Management* v. *Kelly* (3) was a decision as to the meaning of the words "unexpected" and "designed" in Lord *Macnaghten's* exposition. The House was bound by that exposition, whatever it meant. And it was held, and to a large extent on the wide scope of the Act itself, that "unexpected" and "designed" in that exposition meant "unexpected" and "designed" by the workman himself. Lord *Haldane* L.C. said (4): "What the Legislature had in view as a general object to be attained was the compensation of the workman who suffers misfortune"; and "accident includes any injury which is not expected or designed by the workman himself." That represented the views of the majority, and is controlling. The learned Lord Chancellor also said he was confirmed in his view of the unrestricted rendering of the meaning of the word (accident) which he attributed to Lord *Macnaghten* by the case of *Clover, Clayton & Co.* v. *Hughes* (5). The judgments of Lord *Dunedin*, Lord *Atkinson* and Lord *Parker* really rested on the view that "accident," on the proper interpretation of Lord *Macnaghten's* exposition, is opposed to "design," whether it be the "design" of the workman himself or a stranger. The majority decision emphasizes the view that *the workman's status is the governing standpoint.* *Glasgow Coal Co.* v. *Welsh* (6) was a comparatively plain case, in view of the finding of fact. But the reasons stated by the learned Lords are important. Lord *Haldane's* judgment shows that miscalculated action may have the character of unexpected or undesigned event, and therefore of "accident" in the statutory sense. Lord *Kinnear* supports Lord *Macnaghten's* exposition, and demonstrates that the original view

(1) (1905) A.C., 230.
(2) (1900) 1 Q.B., 481.
(3) (1914) A.C., 667.
(4) (1914) A.C., at p. 679.
(5) (1910) A.C., 242.
(6) (1916) 2 A.C. 1.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

taken that the "accident" and the "injury" must be separate and distinguishable—in other words, that an "accident" must be a separate concrete occurrence—was disposed of by *Fenton's Case* (1), and is wrong. Lord *Shaw* observes that the disease and its contraction can, and in that case did, stand together. Lord *Wrenbury* was emphatic on the same point, and called particular attention to the fact that the language of the Act is not "personal injury by *an* accident" but "personal injury by accident," that is, "accidental personal injury." Lord *Loreburn* L.C. previously stressed this in *Warner* v. *Couchman* (2). The very recent case of *Innes* v. *Kynoch* (3) is primarily on another phase, but that phase is the only qualification which, apart from the provision in sub-sec. 2, the Act appears to attach to the generality of the first sub-section of sec. 5. The relevant provision in the New South Wales Act is sub-sec. 2 of sec. 6. That requires notice to the employer containing (*inter alia*) "the date at which the accident happened." But although that was the point for decision in *Innes* v. *Kynoch*, yet, as each branch of sub-sec. 1 of sec. 5 assists in determining the true meaning of every other branch of the whole composite provision (see per Lord *Loreburn* in *Clover, Clayton & Co.'s Case* (4)), prior decisions were greatly in point. The House (Lord *Atkinson* dissenting) held that *Brintons Ltd.* v. *Turvey* (5) covered the question. Lord *Birkenhead* L.C. regarded the principle governing the two cases, in view of present scientific knowledge, as practically one in law, and probably developmental in its operation, and the learned Lord Chancellor held that all that was necessary to constitute an "accident"—even an "accident of the date of which notice was to be given"—was that the injury should have been due to some particular occurrence happening at some particular time in the course of the employment. That it arose out of the employment and unexpectedly was assumed. Lord *Buckmaster's* review of the position supports the fullest application of Lord *Macnaghten's* words, consistently with the requirement as to notice, as to which his view accorded with that of the Lord Chancellor. Similarly Lord *Parmoor* and Lord *Wrenbury* stated the position with a view of harmonizing the provisions of the Statute,

(1) (1903) A.C., 443.
(2) (1912) A.C., 35, at p. 38.
(3) (1919) A.C., 765.
(4) (1910) A.C., at p. 244.
(5) (1905) A.C., 230.

and agreed that the accidental cause of the disease must be located by the claimant " in the course of the employment." Lord *Atkinson*, who dissented, did so, as we gather (1), on the ground that the evidence did not satisfy the burden of proof resting on the claimant.

Further, the House of Lords has held that, where the injury occurs through a risk of the employment, the mere fact that in like circumstances, but outside the employment, the risk would be the same, does not exclude the case from the Act (*Dennis* v. *A. J. White & Co.* (2)). The outstanding feature that marks the House of Lords' decisions, which we have summarized from *Fenton's Case* (1903) to *Innes's Case* (1919), is the broad view that the Act covers all workmen's injuries that arise out of and in the course of their employment, provided only that (1) the injury is due to some accidental occurrence which is sufficiently ascertainable in point of time as to be indicated as arising in the course of the employment; and (2) the causal connection between the accidental occurrence and the injury is not, as a matter of common sense, too remote. If those conditions be satisfied, it is immaterial whether the accidental occurrence arising out of and in the course of the employment and producing the injury (1) is normal or abnormal in relation to the employment, or (2) is a risk that might arise outside the employment, or (3) has an external or an internal effect on the workman, or (4) causes a lesion or a loss of vitality unaccompanied by any other observable organic change, or (5) is or is not an event that can be segregated from the injury itself.

There remains to be considered the case of *Lyons* v. *Woodilee Coal and Coke Co.* (the most detailed report of which is found in the *Law Times* (3)). We have attentively considered that case in several reports, and we think that those reports, taken with the references to the case in the House of Lords in *Innes* v. *Kynoch*, by Lord *Buckmaster* (4) and by Lord *Atkinson* (5), indicate that the decision was that the necessary causal connection between the accidental occurrence there relied on and the injury sustained, was not established, because, the arbitrator having found in fact against such causal connection, there was no sufficient reason

(1) (1919) A.C., at p. 792.
(2) (1917) A.C., 479.
(3) 117 L.T., 65.
(4) (1919) A.C., at p. 777.
(5) (1919) A.C., at pp. 785-786, 790.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Isaacs J. Rich J.

in law for reversing that finding. But that case, regarded negatively, did not determine that a chill, contracted accidentally by reason of an occurrence to which it could be attributed as a result not as a matter of common sense too remote, would be outside the Act. Such a determination is not only not expressly stated, but would be in direct conflict with the series of decisions, some earlier and some later, to which we have referred. We do not agree with the argument that it controls this case. The broad principle of construction applied to the pioneer English legislation—in perfect accordance with the conclusion pointed to by its history—is equally applicable to the New South Wales Act. If that be accurate, the present case is a plain one. The long hours of work had apparently so reduced the man's powers of resistance that he was unable to withstand the effects of the cold air. Of the suddenness and unexpectedness of the attack there can be no question. No finding to the contrary could stand. There was no *gradual* development of injury as would take place, for instance, in lead poisoning in some trades, and which would preclude compliance with sec. 6, sub-sec. 2. No one could contend that the result that occurred is an inevitable, or is even to be expected as a usual, occurrence.

In our view, on the facts as found by the learned District Court Judge, there was necessarily, on a proper construction of the Act, "injury by accident." This is really the only question arguable. It follows from what we have said, that the view taken by *Ferguson* J. was correct, and that the appeal should be allowed.

GAVAN DUFFY AND STARKE JJ. (read by STARKE J.). Sec. 5 (1) of the *Workmen's Compensation Act* 1916, which reproduces sec. 1 (1) of the *Workmen's Compensation Act* 1906 (6 Edw. VII. c. 58), 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, subject as hereinafter mentioned, be liable to pay compensation in accordance with the Schedule One." In this case the learned District Court Judge was of opinion that the appellant, while working at his occupation as an hydraulic winch driver, through the effect of exposure to cold weather during a long continuous spell of work, sustained a sudden

and severe chill which in the ordinary course of the disease developed into pneumonia, and that the pneumonia so affected his arm that notwithstanding a surgical operation he became incapable of doing his ordinary work. The learned District Court Judge thought that these facts justified him in holding that the appellant had sustained an injury arising out of and in the course of the employment within the meaning of sec. 5 (1), but that they precluded him in law from holding that the injury was an "injury by accident." The question we have to determine is whether they did so preclude him. At one time it was thought that in order to substantiate a claim under the sub-section it was necessary to prove two distinct things—first, such an unusual or unlooked for occurrence as would constitute an accident, and next, personal injury as the result of such occurrence. This doctrine was considered and rejected in *Fenton* v. *J. Thorley & Co.* (1), where it was held that if the injury itself was an unexpected mishap it was an "injury by accident." "Unexpected" means unexpected by the person suffering the injury, not by the person inflicting it (*Trim Joint District School Board of Management* v. *Kelly* (2)). In *Clover, Clayton & Co.* v. *Hughes* (3) Lord *Macnaghten* said:—"My Lords, in this case your Lordships have heard a very able and ingenious argument upon the construction of the 1st section of the *Workmen's Compensation Acts*. I need hardly say that it is not from any want of respect to the learned counsel who advanced it that I pass that argument by. It has been disposed of already. It was advanced and rejected in the case of *Fenton* v. *Thorley* (1). There the Court of Appeal had held that if a man meets with a mishap in doing the very thing he means to do the occurrence cannot be called an accident. There must be, it was said, an accident and an injury: you are not to confuse the injury with the accident. Your Lordships' judgment, however, swept away these niceties of subtle disquisition and the endless perplexities of causation. It was held that 'injury by accident' meant nothing more than 'accidental injury' or 'accident' as the word is popularly used."

In the case of traumatic injury the cause of the injury is almost

(1) (1903) A.C., 443. (2) (1914) A.C., 667.
(3) (1910) A.C., at pp. 247-248.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Gavan Duffy J. Starke J.

always plainly and immediately connected with the injury itself, and there can seldom be any room for an inquiry as to whether the injury sustained might have been anticipated as likely to result from the cause, indeed the combination of violent impact and physical injury caused by such impact together constitute what is popularly known as an accident; but, in the case of disease, the cause, and the relation between cause and effect, are often difficult and sometimes impossible to discover. This has led to confusion in the inquiry as to whether a person attacked by disease has sustained a "personal injury by accident" within the meaning of the sub-section. Some Judges have dealt with the composite phrase "injury by accident" and have endeavoured to ascertain whether the injury could be called accidental, either because of the unexpected nature of the occurrence which caused it, or of the unexpected nature of the operation of such occurrence in producing the injury. Others have segregated the word "accident" from the word "injury" and have considered whether the facts of the case established the existence of something which could be called "accident," or "an accident," as distinct from the injury. This diversity is well exhibited in the opinions delivered by the noble and learned Lords who concurred in thinking that the claimant in *Glasgow Coal Co.* v. *Welsh* (1) was entitled to compensation. The workman was employed to bale out a large quantity of water which had accumulated at the pit's bottom owing to the break-down of a pump and consequently contracted sub-acute rheumatism. Lord *Haldane* L.C. said (2):—"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 on which he could find that it had happened. . . . 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. . . . This miscalculated action of entering the water in the present case must be taken to

(1) (1916) 2 A.C., 1.

(2) (1916) 2 A.C., at p. 4.

have constituted a definite event which culminated in rheumatic affection. It was the miscalculation which imported into that event the character of an accident within the meaning of the Act." Lord *Kinnear* said (1) :—" The learned counsel for the appellants argued that in order to satisfy the Act there must be some distinct event or occurrence which taken by itself can be recognized as an accident, and then that the injury must be shown to have followed as a consequence from that specific event. But this is just the argument that was rejected in *Fenton* v. *Thorley & Co.* (2). It is unnecessary to say more ; but I venture to add that the argument seems to me to rest upon a misreading of the Statute, which can only have arisen from a failure to give any exact attention to the actual words. The Statute does not speak of an accident as a separate and distinct thing to be considered apart from its consequences, but the words 'by accident' are introduced, as Lord *Macnaghten* says, parenthetically to qualify the word 'injury.' The question, therefore, is whether the injury can properly and, according to the ordinary use of language, be called " accidental." Lord *Shaw* said (3) :— " Injury by accident is a composite expression. It includes a case like the present, namely, the contraction of disease, arising from extreme and exceptional exposure. This expression—contraction of disease—might also, no doubt, be analytically treated, and it might be said that the disease was the injury and its contraction the accident ; but that carries the matter no farther, and in both cases the composite synthetic expression brings the events together just as they happen in life and in fact. This construction, besides being most simple, prevents the confusion that is apt to arise by the supposed difficulty of applying the Act because the event cannot be fixed in date." Lord *Wrenbury* said (4) :—" In each case the personal injury is not, and cannot be, the accident. It is the result of the accident. The phrase in the Act is 'personal injury by accident.' In this and in every case the inquiry must be whether the personal injury which was sustained was sustained in such a state of circumstances as that it was sustained 'by accident.' I call particular attention to the fact that the language of the Act is not

(1) (1916) 2 A.C., at p. 8.
(2) (1903) A.C., 443.
(3) (1916) 2 A.C., at p. 10.
(4) (1916) 2 A.C., at p. 12.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Gavan Duffy J. Starke J.

'personal injury by *an* accident,' but 'personal injury by accident.' This means, I conceive, personal injury, not by design, but by accident, by some mishap unforeseen and unexpected; accidental personal injury." Notwithstanding this diversity of treatment, the essential inquiry has always been the same, namely, whether the evidence showed that the attack was sudden and unexpected and was attributable to a specific cause; in other words, whether it disclosed the existence of what is popularly known as an accident.

It is said that the case of *Lyons* v. *Woodilee Coal and Coke Co.* (1) is inconsistent with this view. The various reports of the case do undoubtedly give rise to some difficulty. A workman, having finished his night's work, went to the pit shaft to be taken to the surface just at the time when the daily statutory inspection of the shaft was beginning. Usually the inspection took about an hour, but on that morning, owing to a break-down of the bell wire and certain necessary repairs, the cage took an unusually long time in coming down, and the workman remained at the bottom of the shaft exposed to a current of cold air. In consequence he contracted a chill, from the effects of which he died. The arbitrator found in fact and in law that the workman was not injured by accident arising out of and in the course of his employment. The arbitrator stated the following question of law for the opinion of the Court: "On the facts stated could I competently find that the deceased workman was not injured by accident arising out of and in the course of his employment?" Ultimately the case reached the House of Lords, and their Lordships upheld the decision of the arbitrator. In the first place, their Lordships took the view that the arbitrator had, on the facts stated, found that the injury arose out of and in the course of the deceased's employment but was not by accident. It is true, we think, that their Lordships held that the injury—the chill—was not sufficiently connected with and consequent upon the break-down of the bell wire. But it is more difficult to explain why the unexpected results of the occurrence were not so unexpected and unlooked for from the workman's point of view as to be considered accidental. "The question of the existence of the personal injury and of its cause or causes is one of fact, but

(1) 86 L.J. P.C., 137; 117 L.T., 65; 10 B.W.C.C., 416.

'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; and is not a question of fact on which his decision is not open to appeal'" (*Willis's Workmen's Compensation Act*, 18th ed., p. 5; *Fenton* v. *J. Thorley & Co.* (1), per Lord *Lindley*). In *Lyons's Case* the injury and its causes were set out by the arbitrator in some detail, and we conclude, on the facts so stated, that their Lordships were of the opinion that the arbitrator's finding that there was not in fact an injury by accident was not contrary to the facts stated in the case, and so were bound to support it. It is clear that their Lordships in *Lyons's Case* did not in any way depart from the principles of law, or rather of construction, laid down in *Fenton's Case* and in *Clover's Case* (2), and therefore the decision in *Lyons's Case* must be treated as a decision upon the facts actually found in that case. But a decision upon the findings of fact in one case cannot and ought not to govern the decision in another case in which the facts are not identical. *Lyons's Case* does not, therefore, cover this case.

In *Innes* v. *Kynoch* (3) a workman employed in handling artificial manure, consisting mainly of bone dust, died from blood poisoning caused by his becoming infected through an abrasion on his leg by certain noxious bacilli, which were present in large numbers in bone dust, but were also found in the air and other substances, though in a much lesser degree. It did not appear when or how he received the abrasion, and it was impossible to say with certainty when the infection occurred. The arbitrator found, as the result of the medical evidence, that the infection which caused the illness was derived from the poisonous germs contained in the bone dust which the deceased handled in the course of his employment, and awarded compensation under the *Workmen's Compensation Act* 1906. The House of Lords declared the claimant entitled to compensation, and Lord *Birkenhead* L.C. (4) thus summarizes what must be proved to establish the existence of "an injury by accident arising out of and in the course of the employment":—"I may add that the decision of the Second Division against the claim was founded on

(1) (1903) A.C., at p. 453.
(2) (1910) A.C., 242.
(3) (1919) A.C., 765.
(4) (1919) A.C., at p. 772.

H. C. OF A. 1920.

McGUIRE v. UNION STEAMSHIP CO. OF NEW ZEALAND.

Gavan Duffy J. Starke J.

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* (1) 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."

In this case we think that the facts found by the arbitrator do in point of law constitute an injury by accident within the meaning of the Statute. The combination of circumstances and the results are so unexpected and unlooked for from the workman's point of view that they may properly be described as accidental. The learned arbitrator was of opinion that he was precluded in point of law by certain cases from holding that the occurrence was accidental, and in this we think he was in error.

This Court should therefore declare that the appellant is entitled to compensation in accordance with the earnings of the workman agreed upon by the parties.

Appeal allowed. Order appealed from set aside. Decision of the arbitrator reversed. Declare that the appellant was entitled to compensation under the Workmen's Compensation Act 1916 *in accordance with his earnings as*

(1) (1905) A.C., 230.

admitted. Respondent to pay costs in High Court and in Supreme Court. Proceedings remitted to District Court Judge to award in accordance with foregoing declaration, and to make such order as to costs of appellant of original hearing and further hearing as he shall think just.

Solicitor for the appellant, *J. B. Moffatt.*
Solicitor for the respondent, *W. J. Creagh.*

B. L.