Saturday, January 19.

SECOND DIVISION.

[Sheriff Court at Banff.

GRANT *v.* KYNOCH.

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

An employee in a manure factory, whose work consisted in the handling and bagging of artificial manures, became ill with blood-poisoning and died. The point of infection was a scratch on one of the man's legs. It was not proved when or how the deceased received the scratch or when the infection occurred. The arbitrator awarded compensation. *Held* that as the applicant for compensation had failed to set forth the time and circumstances of the alleged accident there was no evidence to support the finding.

Mrs Jane Innes or Grant, widow of James Grant, *respondent*, claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), from Messrs G. & G. Kynoch, manure manufacturers, Isla Bank Mills, Keith, *appellants*, in respect of the death of her husband from blood-poisoning contracted, as alleged, whilst in their employment. The Sheriff-Substitute at Banff (STUART), acting as arbitrator, having awarded compensation, the employers appealed.

The Case stated—"The following *facts* were admitted or proved:—1. The said deceased James Grant for some time prior to the illness which terminated in his death was in the employment of the appellants at their manure works, Keith, and his wages were 25s. per week. 2. His work consisted in the handling and bagging of artificial manures, which are composed largely or wholly of bone dust. 3. On 31st January 1916, while engaged at his work, the deceased became ill with blood-poisoning, from which disease he ultimately died on 16th February. 4. Said illness was due to infection by germs known as streptococci and staphylococci. 5. The point of infection was a scratch or abrasion on the skin of the left leg. 6. It was not proved when or how the deceased received the said scratch or abrasion. 7. It was impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill. 8. The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in decaying matter, in dust, and in the air, although in a much lesser degree. They may be found on the skin and clothes of persons of uncleanly habits. 9. I was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poisonous germs contained in the bone dust which he handled in the course of his employment, and I so found in fact. 10. The respondent was the only dependent of the deceased, and she was wholly dependent on his earnings.

"In these circumstances I *held* it proved that the blood-poisoning which caused the death of the said James Grant was an injury by accident within the meaning of the said Act, and arose out of and in the course of his employment, and I therefore found the respondent entitled to compensation, which I assessed at the sum of £195, and I found her entitled to the expenses of the process."

The *questions of law* were, *inter alia*—"2. Was the blood-poisoning which caused the death of the said James Grant an injury by accident within the meaning of the Workmen's Compensation Act 1906? 3. Was there evidence upon which I was entitled to find that the death of the said James Grant was caused by an injury by accident arising out of and in the course of his employment within the meaning of said Act."

The *note* to the award by the arbitrator was—"It is not disputed that the pursuer's husband died of blood-poisoning. Two species of germ were found, known as streptococci and staphylococci, being what the medical witnesses describe as a 'mixed infection.' I hold it proved that these germs are to be found in abundance in the material which the deceased was handling in the course of his employment. It appears that the point of infection was a scratch or abrasion on the deceased's left leg, but it is not proved when or where he scraped his leg. The defenders argued that the injury to the leg was the 'accident,' or at all events was an essential element in the accident, and since it was not shown that he injured his leg while in the course of his employment the pursuer's case must fail. I am unable to accept that view. It has been decided in the case of *Brinton* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862, that the contracting of a germ disease, as *e.g.* anthrax, even although there be no lesion of the skin or 'accident' in the ordinary sense, may yet be an 'accident' within the meaning of the Act. In *Brinton* the point of infection was the eye, but the arbitrator expressly found that there was no abrasion; his judgment, as he expressed it, 'was based upon the fact that there was a fortuitous intrusion of a foreign substance into the eye which by its presence there caused death.' The House of Lords upheld the award of compensation on the ground that the infection which caused the workman's death was an 'injury by accident.' I think therefore that the question where or when the deceased injured his leg is immaterial. It is, however, essential to the pursuer's case to prove that the 'fortuitous intrusion' of the noxious germs occurred in consequence of the employment in which the deceased was engaged. This must always and necessarily be a matter of inference. In *Brinton's* case the inference may be said to have been inevitable, as the germs of anthrax are not found elsewhere than in specifically infected matter. In the present case there is admittedly a possibility that

the deceased might have received the infection outside his work. The germs streptococci and staphylococci are found in decaying matter, and sometime even to a limited extent upon the human body where habits of cleanliness are neglected. But the inference which I think must be drawn from the medical evidence is that it is in the highest degree probable that the deceased received the infection from the germs contained in the bone dust, and highly improbable that he contracted it elsewhere. This was the opinion of Dr Taylor and Dr Smith, who both attended the deceased during his illness, and were therefore best qualified to express an opinion on the matter. I do not think it necessary to examine the evidence of the medical witnesses in detail. The question, as I have said, is one of probability more or less. It can never be matter of direct proof. Short of that I think the evidence sufficient to justify a finding that there was a 'fortuitous intrusion' of germs into the deceased's system, and that he received the infection from the material which he was handling in the course of his work. If I am right in reaching this conclusion the pursuer is entitled to compensation upon the merits. . . ."

Argued for the appellants—In the present case there was nothing in the nature of an accident arising out of and in the course of the deceased's employment. There had hitherto been no case where a mere infection incurred in such indefinite circumstances had been construed to fall under the term "accident" in the sense of the Act. Such infection had to be clearly connected with an accident sustained whilst the injured person was at work. A claim for compensation could not be substantiated if all that could be said was that it was "probable" that the infection had been acquired in the manner specified, since the deceased might have received the infection anywhere. The arbitrator had pronounced no finding as to when or where the infection had been communicated to the deceased. The applicant had to prove her case and she had not done so. Council cited the following cases:—*Brintons, Limited* v. *Turvey*, [1905] A.C. 230, 42 S.L.R. 862; *Alloa Coal Company* v. *Drylie*, 1913 S.C. 549, 50 S.L.R. 350; *M'Luckie* v. *Watson*, 1913 S.C. 975, *per* Lord Kinnear *app. Drylie* (*cit.*), 50 S.L.R. 770; *Brown* v. *Watson*, 1914 S.C. (H.L.) 44, 51 S.L.R. 492; *Jenkins* v. *Standard Colliery Company*, 5 B.W.C.C. 71; *Wood* v. *Davis*, 5 B.W.C.C. 113; *Chandler* v. *Great Western Railway*, 5 B.W.C.C. 254; *Finlay* v. *Guardians of Tullamore Union*, 7 B.W.C.C. 973.

Argued for the respondent—With regard to the argument that the arbitrator had not found in fact that the introduction of the virus was proved to have taken place in the course of the man's employment, the arbitrator had found all that a scientific investigation really could in the circumstances of the case disclose. It was always a question of greater or less probability whether a bacillus entered the system at any given time. The arbitrator had indicated what the probability was, and was fully entitled, after duly weighing up the facts of the case, to treat that as a finding in fact. He had held it not proved that the scratch by which the poison had entered the man's system had been caused in connection with the respondent's work. But the scratch did not constitute the "accident." The "accident" was the fortuitous contact of the bacilli with the unprotected tissue of the scratch or abrasion. In *Brintons* (*cit.*) no lesion of the skin had taken place. The bacillus had in that case entered through the uninjured eye, and yet it had been held that such an entry was an "accident" within the meaning of the Act. Counsel also referred to *Glasgow Coal Company* v. *Welsh*, 1916 S.C. (H.L.) 141, 53 S.L.R. 311.

At advising—

LORD JUSTICE-CLERK — In this case the learned arbitrator says that he thinks it is immaterial where or when the deceased injured his leg. I do not agree. For anything that appears the injury to the leg may have occurred outside and away from the works altogether, have been in no way connected with the deceased's employment, and have been after the poisonous germs had lodged on the deceased's person or clothes, even assuming them to have originally come from the bone dust.

I have read and agree with the opinion of Lord Dundas.

I think the present case cannot in substance be so distinguished from the three cases reported in 5 B.W.C.C. to which we were referred as to justify us in assenting to the learned arbitrator's decision, if we accept the judicial views expressed in these three cases as being sound, as I think they were.

LORD DUNDAS—In this case I think the learned arbitrator has gone wrong. The proved facts disclose that on 31st January 1916, while James Grant, now deceased, was engaged at his work, which consisted in handling and bagging artificial manures, composed largely or wholly of bone dust, he became ill with blood-poisoning; that he died from this disease on 16th February; that the illness was due to infection by certain germs known as streptococci and staphylococci; that the point of infection was a scratch or abrasion on the skin of the man's left leg; and that it was not proved when or how the scratch was received. Findings 7 and 8 are in the following terms—"7. It was impossible to say with certainty when the infection occurred, though it was probably some days before the deceased became ill. 8. The germs known as streptococci and staphylococci are present in large numbers in the bone dust which the deceased had to handle at his work, but they are also to be found in decaying matter, in dust, and in the air, although in a much lesser degree. They may be found on the skin and clothes of persons of uncleanly habits."

Now assuming that proof of infection by germs from the bone dust which Grant was handling, through their fortuitous concourse with the scratch on his leg, at a given time

and place, might amount to an "accident" within the meaning of the Act, it is plain from the 7th finding that the time of its occurrence is not here proved, while finding 8 leaves it uncertain whether or not the infecting germs in fact came from the bone dust. The respondent's counsel argued that the latter defect is cured by finding 9, which is as follows—"I was satisfied, as the result of the medical evidence, that the infection which caused the illness and death of the deceased was derived from the poisonous germs contained in the bone dust which he handled in the course of his employment, and I so found in fact." Even if this is to be read as a finding in fact, that the infecting germs came direct from the bone dust to the scratch in course of handling, I am far from clear that such a finding was warranted by the whole facts of the case. It is not known where or how the scratch was occasioned, and it appears that germs of the sort are to be found elsewhere than in bone dust. The learned arbitrator says in the note to his award—"The inference which I think must be drawn from the medical evidence is that it is in the highest degree probable that the deceased received the infection from the germs contained in the bone dust, and highly improbable that he contracted it elsewhere. . . . The question as I have said is one of probability more or less. It can never be matter of direct proof." I gravely doubt, to put it no higher, whether the arbitrator was entitled, looking to the whole facts of the case as found by him, to draw the inference involved in his 9th finding.

Assuming, however, that he was so entitled, the time and circumstance of the alleged accident remain in obscurity. This by itself is in my judgment fatal to the claim. The applicant must prove her case. It is I think settled law that, apart from the industrial or scheduled diseases, "unless the applicant can indicate the time, the day, and circumstance, and place, in which the accident has occurred by means of some definite event, the case cannot be brought within the general purview of the Act, and does not entitle the workman or his dependants to compensation"—*Eke* v. *Hart Dyke*, [1910] 2 K.B. 677, *per* Cozens Hardy, M.R., at p. 684. *Brintons, Limited* v. *Turvey*, [1905] A.C. 230, does not help the applicant; it is rather indeed an authority adverse to her claim. The point of the decision and its contrast to a case like the present were clearly stated by the same learned judge in the case just referred to. The Master of the Rolls said (*Eke, sup, cit.*, at p. 682) that the decisions both of the Court of Appeal and of the House of Lords in *Brintons* v. *Turvey*, "entirely turned upon this, that it was found as a fact by the learned County Court Judge, who was the judge of fact, that the anthrax of which the man died was due to the circumstance that at a particular time and at a particular place a particle came from the wool with which he was dealing, settled in the man's eye, and set up the disease which caused his death. In the face of that particular finding of fact the Court held that it was an accident which resulted in his death from anthrax. But I think all the judges carefully abstained from lending colour to the suggestion that a mere disease which you could not say was contracted at a particular time and at a particular place by a particular accident was an accident which entitled a man to compensation." Prior to *Eke's* case, [1910] 2 K.B. 677, there had been at least two similar decisions in England—*Steel*, [1905] 2 K.B. 232, and *Broderick*, [1908] 2 K.B. 807. In *Drylie* v. *Alloa Coal Company*, 1913 S.C. 549, I cited these and other cases in my opinion, with which Lord President Dunedin expressed his concurrence in every part, as illustrating the view that "death from disease" (apart from the industrial diseases specially dealt with by the Legislature) "is not an 'accident' unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising at an ascertained time out of the employment." At the discussion Mr Christie referred us to three recent decisions in the Court of Appeal, all of which, especially the second, seem to me to be closely in point here, viz., *Jenkins*, 1911, 5 B.W.C.C. 71; *Wood*, 1911, 5 B.W.C.C. 113; and *Chandler*, 1012, 5 B.W.C.C. 254. In view of the cases I have cited—and there are others to a similar effect—I think the applicant's claim must fail.

It is unnecessary therefore to consider the point of procedure raised by the first question. It was not I think ultimately pressed by the appellant's counsel, and did not appear to have much substance in it.

I am for answering the third question in the negative, finding it unnecessary to answer the first and second questions, and sustaining the appeal.

LORD GUTHRIE concurred.

LORD SALVESEN was not present.

The Court sustained the appeal and answered the third question in the negative, finding it unnecessary to answer the other questions.

Counsel for Appellants—M'Clure, K.C.—Christie. Agents—Steedman, Ramage, & Company, W.S.

Counsel for Respondent — Mitchell—Macquisten. Agents — Sharpe & Young, W.S.