REPORTS OF CASES IN HOUSE OF LORDS AND PRIVY COUNCIL DEALING WITH QUESTIONS OF INTEREST IN SCOTS LAW.

(Continued from page 460 ante.)

HOUSE OF LORDS.

Tuesday, July 1, 1919.

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

KING *v.* PORT OF LONDON AUTHORITY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 *and Sched. I,* (1) (*b*)—*Prospective Incapacity—Jurisdiction—Form of Order.*

Where a workman meets with an injury from an accident in the course of his employment, but at the date of the arbitration no incapacity has arisen, the arbitrator may, if satisfied on the evidence that incapacity is likely to supervene, make an order adjourning the arbitration, and reserving to the parties right to make further application under the arbitration.

Suggested form of order for the arbitrator.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 2—*Failure to Claim within Six Months—"Reasonable Cause."*

The appellant received an injury to his eye in the course of his employment by the respondents which did not induce immediate incapacity. He remained in their employment for over a year at his old wages, and was subsequently discharged. He then applied to the County Court for a declaration of liability. *Held* that in the circumstances the failure to make the claim within six months was due to reasonable cause in the sense of section 2 of the Act.

Observations on the duty of the arbitrator who finds reasonable cause to set out the reasons for his finding.

Luckie v. *Merry,* ([1915] 3 K.B. 83) *approved.*

The *facts* are detailed in Lord Finlay's judgment.

LORD CHANCELLOR (BIRKENHEAD)—This is an appeal against an order of the Court of Appeal setting aside an award under the Workmen's Compensation Act 1906 made on the 25th September 1917 by Judge Atherley Jones, Judge of the City of London Court.

The facts of the case, which are not in controversy, are fully set out in some of your Lordships' judgments, which I have had the advantage of reading, and I do not think it necessary to repeat them.

The judgment of the learned County Court Judge is unfortunately lacking in lucidity, and it is by no means easy to discover the grounds upon which his decision was based. This circumstance is responsible for much of the difficulty which was felt in the Court of Appeal and by your Lordships. I have, however, formed the view that the decision of the Court of Appeal cannot be supported, and though I hesitated for some time upon this point, I have reached the further conclusion that it is not necessary to remit the matter to the learned County Court Judge for more scientific consideration.

Two points alone require decision, and I deal with them in order.

The first is whether the incapacity, which is a condition-precedent to liability under the Act, means incapacity at the actual moment of the arbitration, or whether it includes the case of latent incapacity. The question may be stated somewhat more elaborately—Where the applicant has met with personal injury which has not produced incapacity at the date of the arbitration, but which is of such a nature that it is probable that partial or total incapacity may ensue as a result, has the arbitrator jurisdiction to make an award? The question is one of very great importance. Even if, as I think, it must be answered affirmatively, it is still one in which appellate tribunals require upon the question of fact the assistance of those who sit as arbitrators at first instance. Your Lordships have not in this case received such assistance. It is not even plainly found that it is reasonably probable that partial or total incapacity may ensue as a result of the personal injury which the workman sustained. I am, however, of opinion that this is what the learned County Court Judge intended to find. Otherwise much if not all of his judgment would be absolutely unintelligible.

Adopting this view, I address myself to the argument pressed upon your Lordships with great ingenuity by Sir J. Simon. That argument was in effect that inasmuch as no existing incapacity had been proved before the arbitrator, he was bound on a true construction of the Act to dismiss the applicant's claim. It is not denied that if this

contention were adopted much hardship might be occasioned to an applicant who had sustained personal injury indisputably carrying with it the seeds of future incapacity, but not exhibiting that incapacity at the moment when the arbitration was held, and when in his interests it ought to be held. Nevertheless it would, of course, be necessary to adopt this view, surprising as the consequences might be, if a proper construction of the Act required it. I am, however, of the opinion that the Act cannot and ought not to be so construed. Section 1, sub-section 1, of the Act provides that the employer is liable to pay compensation where the workman has sustained an injury arising out of and in the course of his employment. It is quite true that under the terms of that sub-section the compensation to be paid is in accordance with the First Schedule to the Act, but your Lordships have long since laid it down in clear and unambiguous language that the first provision contains the ruling enactment, and that the words "in accordance with the schedule to the Act" are not restrictive of the right of the workman. Section 1 (3) of the Act provides for the settlement by the arbitrator of any question arising in any proceedings under the Act as to the liability to pay compensation. It was argued upon this sub-section by Sir J. Simon that no such question could arise unless it is alleged that the present liability to pay has actually occurred. I am unable to agree with this argument. I can find nothing in the sub-section which excludes the case of a present injury which is reasonably likely to lead to incapacity for work in the future; and if this sub-section contains no such exclusion there is certainly none to be found in any other part of the Act. In my opinion therefore this argument altogether fails. I confess that I form this opinion with pleasure. It would in my view have been disastrous if it were necessary to adopt a construction of the Act which excluded from its operation the case of an applicant in respect of whom it was proved (1) that he had sustained injury by accident arising out of and in the course of the employment; (2) that there was no incapacity at the moment; but (3) that it was reasonably probable that that incapacity would arise at a later date. Common sense and justice alike require that in such a case the door should not be closed to the applicant, and it is satisfactory that your Lordships should have reached a clear conclusion on this point. The evident hardship of the opposite view to the applicant is not cured by the prospect of a later hearing. The necessary witnesses in such cases are often fugitive; and the just complaint of the applicant might easily be destroyed by the indefinite postponement of a hearing.

I have only to add upon this part of the case, that if I am right in supposing that the learned County Court Judge intended to find in fact that future incapacity was reasonably probable as a result of the accident, he had before him ample material upon which he might properly found that conclusion. In the valuations of the employment market there is a difference between a one-eyed man and a two-eyed man. Indeed the behaviour of the respondents in this very case made it plain that they were fully alive to this very elementary circumstance.

A form of order which was drafted after consultation with my noble friend Lord Atkinson seems to me very suitable for adoption in such cases as the present. It is in the following terms:—"It is hereby declared that the claimant has received an injury by accident arising out of and in the course of his employment, but inasmuch as the evidence has not established that up to the date hereof the applicant has as a result of such injury been incapacitated for work for any period, but has on the other hand established that there is a reasonable probability that such incapacity may ensue, it is ordered that this arbitration do stand adjourned, reserving to each of the parties hereto liberty to make such further application in the matter of this arbitration as he or they may be advised."

I proceed to consider the second point. The accident in this case was on the 18th December 1915. No claim for compensation was made within six months from its occurrence. Section 2, sub-section 1, of the Act contains the following provision:—"Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that . . . (*b*) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

The arbitrator's finding upon this part of the case is contained in the following passage:—"With regard to the present contention, namely, that the claim was not made within six months, I think the circumstances disclosed in this case, which I need not elaborate, are such as to enable me to afford the relief which is provided by the second proviso to the second section of the statute. I think that proviso is applicable to this case."

The terms of this finding are highly obscure and unfruitful. It was the duty of an arbitrator to set out plainly the facts which led him to the conclusion that the proviso was applicable. But here again I have formed the view, exploring my way doubtfully through the language in which his judgment is expressed, that the learned County Court Judge has in effect, though in a very unsatisfactory manner, found that the facts proved before him and available for your Lordships' consideration amounted to reasonable cause; and I am of opinion

that there was evidence before him which entitled him to reach the conclusion which in my view he formed.

The facts in the present case are by no means unlike those disclosed in *Luckie* v. *Merry* (1915, 3 K.B. 83), and upon the facts of that case I approve of the decision in that case. I expressly guard myself against the supposition that I lay down any general principle that under all circumstances the continued payment of the same wages by the employer to the injured workman after the accident amounts to reasonable cause for not giving notice. The general atmosphere must always be considered. It is sufficient for me to say that the evidence given before the County Court Judge justified without perhaps requiring the conclusion that the workman made no formal claim for compensation because he formed the view, encouraged thereto by the conduct of the employer, that he would receive compensation should incapacity supervene in the future without the necessity of making a formal claim. It is very easy to imagine cases in which the attitude of the employer during the critical six months may appear to be at once so promising and so generous that there is very reasonable cause for an omission to give notice. There are other cases falling upon the other side of the line. It is enough for me to say that in my opinion the present case belongs to the first class.

It is perhaps proper for me to add that although the subject was frequently referred to in debate, it is not necessary for the purpose of the decision to discuss the alternative practice of ordering on an original application or otherwise a nominal payment in order to keep alive a claim founded upon the prospect of incapacity in future as the result of the accident. I prefer the method carried out by the order which I venture to recommend to your Lordships, but I ignore neither the weight nor the number of the decisions which have sanctioned the alternative course.

For the reasons given above I am of opinion that this appeal should be allowed with costs, and I move your Lordships accordingly.

LORD FINLAY—The appellant was a workman in the employment of the respondents. While at work he was struck in the right eye, and a claim for compensation under the Act was made. The case came before Judge Atherley-Jones as arbitrator, and he made an award in the following terms:—"I order that there be a declaration of the liability of the respondents to pay compensation to the applicant should it hereafter be shown that he is unable to earn full wages by reason of the accident the subject-matter of this arbitration."

The Court of appeal allowed an appeal from this decision and set the award aside, ordering that an award should be entered in favour of the respondents with costs. The applicant has appealed to your Lordships' House, and asks that the award of Judge Atherley-Jones should be restored.

Two points arise for determination — (1) Whether it was competent for the arbitrator in a case under the Workmen's Compensation Act to make such an award, incapacity to earn wages not having yet resulted from the accident, and (2) whether the omission in this case to make a claim for compensation within six months was a bar to the proceedings, or whether it was excused on the ground that the failure was occasioned by reasonable cause within the meaning of section 2 (1) (*b*) of the Act.

I shall deal with those two points separately.

The appellant has suffered from disease of the right eye for a long time, and although he could distinguish light from darkness with it he could not discern objects. On the 18th December 1915 while at work he was struck in the right eye by a rope sling. Inflammation resulted. He was kept on in the employment of the respondents at lighter work, but was paid his regular wages as before, and on the 21st March 1916 he returned to his old work and remained at it till the 21st February 1917 when he was dismissed. On the 28th of the same month a letter was written to the respondents by the appellant's solicitors claiming compensation, and a formal application was made in the City of London Court on the 12th July 1917. The application stated that questions had arisen as to the liability of the respondents to pay compensation under the Act, and as to the duration of the compensation. In the particulars under the sixth head, which required a statement of particulars of incapacity for work, it was stated by the applicant that there was "no incapacity at present." The respondents by their answer claimed that the proceedings should be dismissed with costs on the ground that it was admitted by par. 6 of the applicant's particulars that the applicant had not been incapacitated as a result of the accident.

The case was heard by Judge Atherley-Jones on the 25th September 1917. Mr Arnold Lawson, the senior surgeon at Middlesex Hospital, was called as a witness for the applicant and stated that the right eye was blind, that he considered it desirable that it should be removed, and that its condition was due to the aggravation caused by the accident. He further said that it would be desirable to remove the eye, and that it was a diseased eye before the accident, and added—"Apart from the accident, not now but in the future, it might be necessary to remove the eye."

The medical evidence for the respondents was substantially to the same effect, namely, that the accident had aggravated the condition of the disease in the eye, and precipitated probably the necessity for removal.

The arbitrator in his award, after reviewing the evidence and the terms of the Act, and the practice which has grown up of making what are called "suspensory orders," said—"I think that if I am satisfied, following the words of the statute, that a personal injury by accident has arisen to the employee while in the employment and within the scope, &c., of his employment, I am entitled to declare that the liability does exist, not to order what comes under the

suspensory provision, but I am entitled to say that there is a liability attaching to the employers though it may never fructify—that is to say, the employers may never be called upon to pay anything, but there is liability arising from the accident which resulted in the injury to this man."

An award was accordingly made in the terms which I have set out above.

The Court of Appeal set this award aside, saying—"The facts show that there is no possibility of incapacity in the future as the result of the accident." And again—"The right eye of the man has always been useless, and the fact of any possible or probable recurrence of any effects of the accident is negatived by the evidence."

It seems quite clear on the evidence that the effect of the accident in all probability will be that the eye will have to be removed at an earlier date than that at which, but for the accident itself, removal would be necessary. The removal of the right eye would affect the wage-earning capacity of the workman. It is true that the right eye was not, before the accident, useful for purposes of vision, but when the eye has been removed the man will be evidently a one-eyed man, and for that reason may be less likely to get employment.

The condition of the right to compensation is not incapacity to work but incapacity for work, and when one eye has been removed as on medical evidence this eye will have to be removed before it would otherwise have been necessary, the wage-earning capacity of the man may be diminished owing to the fact that on the view he will then be a one-eyed man. It was open to the arbitrator to find that this was a probable result of the accident. Whether and how far such incapacity for work in fact results from the removal of the right eye is a question that will have to be determined when the event occurs, but in my opinion it was quite open to the arbitrator to find that it is a probable consequence of the accident in the future.

On appeal to your Lordships' House it was strongly contended for the respondents that actual incapacity at the time when the application under the Act was made by which the proceedings are initiated is a condition-precedent to any award in favour of the applicant. It was argued that there was no jurisdiction to make any award for the claimant unless compensation be actually payable, or at all events that if it is not yet payable the applicatiou must be dismissed as premature.

I cannot read the Act in the sense contended for by the respondents. Its effect is that 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 to the provisions of the Act, be liable to pay compensation in accordance with the first schedule (section 1, sub-section 1, of the Act). The employer is not to be liable unless there is disability to earn full wages for at least one week — section 1, sub-section (2) (a). The first schedule (par. 1 (b)) regulates the amount of payment to be made where total or partial incapacity for work results from the injury. Section 1 (3) of the Act provides for the settlement by arbitration of any question arising in any proceedings under the Act as to the liability to pay compensation. It was urged that no such question could arise unless it is alleged that a present liability to pay has accrued, and that unless this be proved the application fails altogether. I cannot put any such construction upon the words of sub-section (3) of the first section. The words of the sub-section are apt to cover the case of a present injury falling within the Act which will probably lead to incapacity for work in the future. It is highly desirable that the facts as to the accident should be ascertained at the earliest possible date, and I can find in the words of the Act no support for the argument of the respondents that there is no power to adjudicate on this point unless incapacity has accrued giving a present right to compensation.

It has been not uncommon to make what are called "suspensory awards" in such cases, awarding a nominal sum per week by way of keeping the proceedings alive until the time comes when it can be determined whether incapacity for work will be the result. I think that it is much better that the finding as to the accident should be followed by a postponement of the determination of the question of a right to compensation until events have shown whether the accident has produced incapacity. Such a course was recommended so long ago as 1899 by Vaughan Williams, L.J., in the case of *Chandler* v. *Smith*, 1899, 2 Q.B. 506. It was adopted in the present case. I think that the form of the award should be altered as has been proposed from the Woolsack, but in substance such an order will restore the award made by the arbitrator. It was admitted on behalf of the respondents that a suspensory award could be made on application for review under par. 16 of the First Schedule, but it was contended that this was incompetent on an original application. I can find nothing in the words of the Act to support this distinction. It would in practice be extremely inconvenient, as an early decision on the point whether the accident falls within the terms of the Act is most desirable. Of course, no such consideration of convenience would justify disregarding any definite provisions of the Act laying down such a rule of practice. But there are no such provisions. On the contrary, the construction which the respondents desire your Lordships to adopt is in my opinion a very strained one, and involves the importation into the provisions of the Act for arbitration of a technicality which is not to be found there, and which would seriously embarrass the working of the Act in practice.

I agree that the further proceedings should be so postponed only where it is shown to the satisfaction of the arbitrator that there is a probability of the supervention of incapacity. In the present case I think the arbitrator was justified in finding that this was probable.

A great many authorities were cited to

your Lordships. The question, however, is a very simple one, and depends on the words of the Act. There is nothing in any of the cases cited which would conflict with the conclusion as to the meaning of its provisions at which I have arrived, and no useful purpose would be served by going through these authorities again in detail.

It was further contended on behalf of the respondents that the application should have been dismissed on the ground that the claim had not been made within six months. This depends on the provisions of section 2, sub-section 2, of the Act, which so far as material are as follows :—" . . . [*quotes*] . . ."

All that the arbitrator says on this point is—" With regard to the second contention, namely, that the claim was not made within six months, I think the circumstances disclosed in this case, which I need not elaborate, are such as to enable me to afford the relief which is provided by the second proviso to the second section of the statute. I think that proviso is applicable to this case."

The proper course for the arbitrator would have been to set out the circumstances which in his opinion amounted to reasonable cause. In awards under this Act great care ought always to be taken to keep separate questions of fact and questions of law. I wish the arbitrator had been more specific in his findings. But I think that on the facts of this case the arbitrator was justified in finding that there was reasonable cause for not making the claim within six months on the principle which was acted on by the Court of Appeal in *Luckie* v. *Merry*, 1915, 3 K.B. 83.

The applicant was cross-examined on this point, as appears from the following extract from the transcript of the proceedings :—" (Q) I want to know this. You say you felt pain from the time of the accident and it affected your sight, and it affected the sight not only of the right eye, but it also affected the sight of the left eye?—(A) Yes. (Q) You knew that, I suppose, within a few weeks of the accident?—(A) Not within a month or so. (Q) Did you think then it was a serious matter?—(A) I did. (Q) Why, when you thought it was a serious matter and your sight was affected in that way, why did you not make a claim for compensation on the Port Authority?—(A) They were treating me in a fair way in giving me light labour and I did not see it was necessary to take compensation. (Q) Your eye was getting worse and affecting the sight of the sound eye. Did you know about your right to compensation under the Workmen's Compensation Act if you met with an accident?—(A) No, I do not know that I did. (Q) Did you know you had a right to be compensated if you met with an accident?—(A) Not while I was employed at doing labour. (Q) You did not know you could make a claim while still employed?—(A) Yes, I did not know it. (Q) Is that the reason why you did not make any claim?—(A) Yes. (Q) The only reason is that you did not know you were entitled to make a claim whilst you remained in their employment?—(A) While I was receiving wages."

Till the 21st February 1917 the appellant was kept on by the respondents at his old wages, and one can quite understand his reluctance under these circumstances to engage in litigation with his employers. I cannot say that the course he took in not giving notice of claim was under the circumstances unreasonable. On the contrary, he might reasonably delay giving notice in view of the kind treatment he was receiving and his expectation it would continue. The applicant's case on this point is not a very strong one, but I think it was open to the arbitrator on the evidence to which he summarily refers to find that there was reasonable cause within the meaning of the section, and I understand his award to be such a finding.

I am therefore of opinion that the decision of the Court of Appeal should be reversed, and that an award be made in the terms that have been proposed by the Lord Chancellor. The respondents should pay the appellant's costs here and below.

Lord Atkinson—I have on several occasions, particularly in delivering judgment in the cases of *Herbert* v. *Samuel Fox & Company* ([1916] 1 A.C. 405, 53 S.L.R. 810) and *Hutchinson* v. *M'Kinnon* ([1916] 1 A.C. 471, 53 S.L.R. 232), endeavoured to point out that arbitrators in cases of this kind, whether they be County Court judges or other, should make it clear on the face of their awards what are their rulings on pure questions of fact, what on questions of law, and what on mixed questions of law and fact, for the very sufficient reason that rulings of arbitrators on the two latter classes of cases are open to complete review by appellate tribunals, while the rulings on the first-mentioned class cannot be disturbed if there was evidence before those who made them upon which they might reasonably find as they have found. In my experience, now somewhat lengthy, I have never met with a case in which such a practice as that suggested has been more completely disregarded and departed from than in the present case. The result is that the difficulty one meets with is not to determine whether the learned County Court Judge decided rightly or wrongly on the points raised before him but what he intended to decide, and what, if anything, he did decide. I take, for example, the question raised as to the making by the applicant of the claim for compensation. His claim was admittedly not made within the time fixed by section 2, sub-section (1), of the Workmen's Compensation Act of 1906, namely, six months from the date of the occurrence of the accident causing the injury. The point for decision was whether the failure to make it within this period was occasioned by " mistake, absence from the United Kingdom, or other reasonable cause "—section 2, sub-section 1, proviso (*b*). It was resolutely contended before your Lordships that just as in an action for malicious prosecution the jury finds the facts and the judge decides upon their findings the question of law whether the prosecution was instituted with or without reasonable and probable cause, so here the learned County Court Judge as the judge

of fact should have stated upon the face of his award his conclusions of fact touching the applicant's failure to make his claim within the time specified, and as the judge of law his ruling upon those conclusions as to the presence or absence of reasonable cause occasioning the failure. I am not sure that this contention is sound. At all events the learned County Court Judge in this case has not done either of these things. The only approach to an expression of opinion upon the question of the applicant's failure to make his claim in time is contained in the following ambiguous passage in his judgment—"With regard to the second contention, namely, that the claim was not made within six months, I think the circumstances disclosed in this case, which I need not elaborate, are such as to enable me to afford the relief which is provided by the second proviso to the second section of the statute. I think that proviso is applicable to the case." I suppose what the learned arbitrator—for that is his real character in this matter—meant to state in this passage was that the evidence in the case satisfied him that the applicant's failure to make his claim in time was occasioned by certain established facts or occurrences which in his opinion amounted to a reasonable cause other than mistake or absence from the United Kingdom within the meaning of section 2, sub-section 1, proviso (*b*). I so conjecture because mistake and absence from the United Kingdom were excluded by the evidence, though not at all by the language of the learned County Court Judge in the above-mentioned passage. He makes no formal finding at all. As it has not been contended that the learned Judge's note of the evidence is not accurate, though certainly meagre, I think the applicant is in justice entitled to have that evidence considered by your Lordships, and to have such a decision on this preliminary point pronounced by this House as your Lordships are of opinion should have been pronounced by the County Court Judge. In determining whether the cause occasioning the applicant's failure to observe the statutory time is reasonable or not, it is not irrelevant to consider what is the nature and function of the claim for compensation with which this section of the statute is concerned. No specific sum need be mentioned in it. It need not be expressed in any technical form of words. It need not be reduced to writing. It will be sufficient if in some form of words it "makes it clear to the employers' mind that a claim for compensation under the Act is being made"—see judgment of Cozens-Hardy, M.R., *Johnson* v. *Wotton*, 1911, 4 B.W.C.C. 258. It is not the initial step in proceedings before any tribunal by which compensation is to be assessed. It is wholly different in its object from "the notice of the accident" which gives to the employer detailed information on many points which it is essential he should possess in order to protect his interests—see section 2. A speedy notice of that kind is vital, but it cannot be of any great importance in almost any case from the employers' point of view whether the claim for compensation is made within the period of six months from the happening of the accident or at a later period. And the function of the claim would appear to be to raise the question mentioned in section 1, sub-section 3, of the Act as to the employers' liability to pay compensation, which is the question which can subsequently be referred to arbitration. It is the initial step in the proceedings to raise and shape that question. Should the employer comply with the workman's claim then of course there is no question, no dispute to be arbitrated upon. Should he dispute the claim then the issue is knit, the question raised, the dispute called into existence. The claimant, however, is not bound to proceed at once to arbitration. If he should abstain from so doing for a length of time the employer can himself procure an arbitration to be held. The case of *Powell* v. *Main Colliery Company, Limited* ([1900] A.C. 366), together with the judgment of Romer, L.J. ([1900], 2 K.B. 145-157), approved of in this House, establish each of these propositions.

Now what then is the nature of the reasonable cause other than mistake or absence from the United Kingdom which excuses the workman from making the claim for compensation within six months from the date of the accident? Of course it is reasonable cause having reference to the workman himself. I think the cases of *Turnbull* v. *Vickers* (1914, 7 B.W.C.C. 396), *Luckie* v. *Merry* (1915, 3 K.B. 83), and *Abbot* v. *Biggleswade Joint Hospital Board* (1915, 9 B.W.C.C. 107) establish that where all the facts of a particular case prove to the satisfaction of an arbitrator that a workman, to the knowledge of the employer or his agent, intends to seek compensation for an injury by accident sustained by him, and the employer or his agent says or does something calculated to lead the workman to form a belief on which he acts, that without making a claim compensation will be given to him in the form of continuing him in his employment at his former wages, though he may not be able to do efficiently all his former work or such like, the arbitrator, as a judge of both law and fact, would be justified in holding that reasonable cause existed for the workman's omitting to make a claim formally within the six months. Something very like this state of facts exists in the present case. The claimant was injured on the 11th December 1915. He on that day reported to his foreman the fact of the accident having occurred, and then went to the hospital and got treated. The doctor wished to detain him and remove his right eye. At the time of the accident he could distinguish light from darkness by this eye. In a month or two afterwards he lost the sight of it completely. He again reported the accident to one of his employer's agents, W. Laken, on the 20th December. His eye getting worse he had an interview with the superintendent manager. Most unfortunately what took place between them is not stated at length in the judge's notes, as it should have been; but I think it is reasonable to conclude that the defendants or their servants were led to believe

that the applicant would not be content to suffer under this serious injury without looking for compensation, and that they must have anticipated that he would make a claim for compensation unless something was done to satisfy him. In these circumstances the superintendent advised the claimant to get a lighter job with his employers. He got this lighter job at his old wages, and continued to work at it till March, when he went back to his old work. He continued at his old work at his old wages till February 1917, when, having been examined medically on behalf of the sick club belonging to the Port of London Authority, he was dismissed. I think the rational conclusion to be drawn from this evidence is that the workman abstained from formally making a claim for compensation by reason of his being put into a light job at his old wages, thinking that this benefit was intentionally conferred upon him towards compensating him for the injury he had sustained, and leading him to believe that he would get compensation without a formal claim. If this be so, I think reasonable cause did exist for his omission to make his claim formally within the statutory period. In the applicant's particulars of claim, dated the 12th July 1917, he states that he was not suffering at the date thereof from any incapacity, and the amount of compensation claimed by him is one penny per week, or alternatively a declaration that in the event of his hereafter being totally or partially incapacitated for work or being unable to earn the same average weekly earnings as before the accident he shall be entitled to compensation under the Workmen's Compensation Act 1906. In the judgment of the learned County Court Judge I find the following passage:—"I think, therefore, that if I am satisfied, following the words of the statute, that a personal injury by accident has arisen to the employee while in the employment and within the scope, &c., &c., of his employment, I am entitled to declare that the liability exists, not to order what comes under the suspensory provision, but I am entitled to say there is a liability attaching to the employer which may never fructify — that is to say, the employers may never be called upon to pay anything, but there is a liability arising from the accident which resulted in the injury to the man." And accordingly the first paragraph in his award runs as follows:—"Having duly considered the matters submitted to me I do hereby make my award as follows:—I order that there be a declaration of the liability of the respondents to pay compensation to the applicant should it hereafter be shown that he is unable to earn his full wages by reason of the accident, the object-matter of this arbitration."

I presume the learned Judge by this order means that he was of opinion that the applicant had sustained a personal injury by accident arising out of and in the course of his employment, but if so he ought to have formally found that this was so. That is the essential fact which must be proved to bring the case within the statute, and unless and until it is found the County Court Judge has in my view no jurisdiction whatever to make any order dealing either with present or future incapacity, total or partial. It does not appear to have been contested at the hearing that the applicant had met with such a personal injury, and possibly that fact accounts for the scanty nature of the note of the evidence touching the point; but the strangest thing about this strange judgment is that the learned Judge has not only not found specifically that though the applicant was not suffering at the date of the arbitration from any incapacity, it was reasonably probable that partial or total incapacity might ensue as a result of the personal injury he has sustained. He seems to have thought that an applicant is entitled to what is styled a "suspensory order" for the asking for it without any proof whatever that future incapacity may probably ensue.

In my view that view is wholly erroneous. If no present incapacity be proved it is not to be assumed that future incapacity will ensue, but on the other hand if the personal injury, though it does not produce present incapacity, so affects the workman's system that future incapacity will with reasonable probability ensue, then the taint thus given to the workman's system, reasonably likely to cause incapacity in future, is a matter for which the workman is I think entitled to be compensated quite as much as for any incapacity which was the immediate result of the injury. His bodily system is injured; he is not the same man he was. The fact that some time must elapse before the results of that injury will develop themselves cannot defeat his right to compensation. The medical evidence shows, in my view, that future incapacity, partial or total, is a reasonably probable result of the personal injury by accident which the applicant has sustained. In order to do justice your Lordships are therefore I think entitled to make such an order as that evidence convinces you the County Court Judge should have made. This case has been argued on behalf of the respondents as if this arbitration before the County Court Judge was similar to an action in which special damage actually sustained is the gist of the action, such for instance as an action for the obstruction to a public highway where the plaintiff alleges he sustained damage different from that sustained by an ordinary member of the public, this particular loss constituting his cause of action. And it was contended that no present incapacity having been proved the applicant was not entitled to compensation, and the County Court Judge had no alternative but to dismiss his application.

I am by no means satisfied that this is a true analogy. Section 1, sub-section 1, provides that the employer is liable to pay compensation where the workman has sustained an injury by accident arising out of and in the course of his employment. No doubt that sub-section also provides that the compensation is to be paid in accordance with the first schedule to the Act.

But in *Lysons* v. *Andrew Knowles & Son, Limited*, 1901 A.C. 79, Lord Halsbury, at p. 85, said that this first provision was the affirmative and leading enactment, and at p. 86 said if he came to the conclusion that there was no mode in the schedule by which the quantum of compensation could be fixed, he should still be of opinion that there was no repealing of the right which had just been granted, but that by arbitration or some other means which he thought would be quite within the powers of the Act the compensation should be ascertained, because he did not look upon the provision made in respect of compensation as one which either in language or the intention of the Legislature was meant to cut down and override the primary right given to every workman to compensation, but that he merely regarded it as a mode of ascertaining what the quantum was to be.

Lord Macnaghten expresses practically the same view, pointing out that the right to compensation is given by the Act, but that the compensation is to be not "as defined by the schedule" or "in the terms prescribed by the schedule," but "in accordance with the schedule"—words importing a certain latitude.

Lord Davey concurred with Lord Halsbury, and said he could not read the words "in accordance with the schedule to the Act" as being restrictive of the right of the workman or the obligation of the employer to pay compensation; that he should not consider that those words limited or restricted the right of the workman to receive compensation or the obligation upon the employer to pay compensation, but as intended to denote the manner and mode in which that compensation was to be carried into effect.

I think therefore that the proposition so strenuously insisted upon, that no existing incapacity being proved before the arbitrator, he had no alternative but to dismiss the applicant's claim is thoroughly unsound, for this reason, that the workman may by the injury have been made a different man from what he was before it, quite as able, no doubt, for a time to work at his former work as efficiently as ever, but with a morbid tendency implanted in his system as a result of this injury which it is reasonably probable will develop incapacity to some extent at no distant date. The existence of that tendency, though latent for the time, is an injury for which section 1 of the Statute entitles the workman to be compensated, though the incapacity arising from it is, at the time of the arbitration, inchoate and undeveloped.

I am therefore quite unable to see upon what principle an order should not be made even at the original hearing framed in such a way as to allow the reasonably anticipated incapacity resulting from this morbid and hidden tendency time to develop itself. I do not think that an answer is afforded by the argument that the workman, though he makes his claim, is not bound to proceed with the arbitration. He can wait till the anticipated incapacity becomes actual incapacity and then proceed. The cases of—*Griga* v. *Owners of Steamship Harelda* (3 B.W.C.C. 116) and *Green* v. *Cammell, Laird, & Company, Limited* (1913, 3 K.B. 665) decided that it is as competent to make a suspensory order on an original application as it is to make it on an application to review. I thoroughly approve of both these decisions, and am therefore of opinion that in this case the order already suggested should be made and this appeal be allowed with costs.

LORD PARMOOR — The appellant in this case is a workman who, for some time prior to the 18th December 1915, was employed by the respondents as one of their permanent labourers. From early childhood his right eye had been practically useless, but he could distinguish light from darkness, and there was no disfigurement. On the 18th December 1915, whilst the the appellant was unloading the steamship 'Comery Castle' in the East India Dock a double-rope sling swung back and struck him in the right eye. The accident was reported and entered in a book called the Accident Report Book, but the appellant continued his usual work until the 11th January 1916, when he was given a lighter job at the same wages. He worked at this lighter job until 21st March 1916, when he resumed his usual work and performed the same without complaint or interruption until February 1917. At this date the appellant applied for admission to the membership of a sick club open to employees of the respondents, and was examined by the respondents' doctor. The respondents then learned of his defective eyesight for the first time, and he was discharged on the 21st February 1917, not for any incompetence or inefficiency in his work but because of the condition of his eyesight. No claim for compensation was made until the 23rd February 1917, upwards of fourteen months after the accident occurred. On the 12th July 1917 arbitration proceedings were commenced in the City of London Court, and the learned Judge finding that the injury complained of was the result of an accident arising out of and in the course of the appellant's employment by the respondents, but that no incapacity had so far resulted, made an award with a declaration of liability against the respondents. This award was set aside in the Court of Appeal on the ground that no declaration of liability should have been made against the respondents, as there was no evidence of any probable incapacity to the appellant in the future as the result of the accident, and further, that the appellant's failure to make a claim for compensation within six months of the occurrence of the accident was not found to have been occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

The first question to determine is whether there was any evidence on which in reason the learned Judge could find that there was reasonable probability of incapacity to the appellant in the future as the result of the accident. The surgical evidence was given by the senior surgeon at Middlesex Hospital on behalf of the appellant, and by the senior

surgeon of the City of London Hospital on behalf of the respondents. They were in agreement that it might be necessary to remove the eye in future, and the witness for the respondents says — "The accident would aggravate the condition of the defect in the eye, and precipitate probably the necessity of removal." It is clear therefore that there was evidence from which a conclusion might be drawn that the accident would probably precipitate in the future the removal of the appellant's eye. The further question arises whether in the result of such removal there is ground for the inference that the wage-earning power might be probably diminished. On this point the action of the respondents in dismissing the appellant is directly relevant, but apart from this it is in my opinion impossible to say that there is no reasonable probability that the removal of an eye may affect the wage-earning power of the person injured. Whether in fact this result follows is a matter for subsequent inquiry, and the form of order which is proposed does nothing more than leave this question open for determination at some future date.

The second question before your Lordships is whether the learned Judge exercised properly his judicial discretion in holding that the failure to make a claim within six months of the date of the accident was occasioned by reasonable cause, and consequently not a bar to claim. No doubt the relevant facts should be found by the learned Judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute. There is no direct finding of the facts in the present case, but they never were in dispute, and it appears that the notice was delayed until the period of the dismissal of the appellant from his employment. I can see no reason why on these facts the learned judge might not have found in favour of the appellant, or that there is any reason for interference with his discretion. A very similar question arose in the case of *Luckie* v. *Merry* (1915, 3 K.B. 83), and I agree with the decision of the Master of the Rolls in that case. No general principle is involved, nor can it be said that under all circumstances payment of wages will be a reasonable cause, but the Court is bound to look at the circumstances of the relation between the man and his employer in the particular case under consideration.

A further question of general importance was argued in your Lordship's House. It was urged on behalf of the respondents that where no incapacity has in fact arisen no award can be made against an employer. It was argued that all the proceedings were *coram non judice* and that the arbitrator had no jurisdiction. I think that this contention cannot be maintained. A dispute had arisen in proceedings under the Workmen's Compensation Act 1906 as to the liability to pay compensation under that Act, and when such a dispute has arisen the arbitrator has statutory jurisdiction under section 1 (3) and is bound to consider the matters brought before him. The dispute is the foundation of the jurisdiction of the arbitrator, provided that it is *bona fide* and not frivolous. If there had been no jurisdiction in the arbitrator it would have been competent for the appellant to take subsequent proceedings; but, on the other hand, if there is jurisdiction the matter must be determined and decided and it would be incompetent for either party to institute further arbitration proceedings. It is no objection to the jurisdiction of an arbitrator that the employer is not liable under the Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed, but if an employer brings himself within this exemption at the hearing the decision must be given in his favour. For instance in the present case the appellant could not succeed unless, at the subsequent hearing, he could prove that he had been disabled for a period of at least one week from earning full wages at the work at which he was employed. Sir J. Simon in his argument on behalf of the respondents placed great weight on the authority of *Powell* v. *Main Colliery Company, Limited* (1900 A.C. 366), in which it was held that "the claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer. I do not think that this case has any relevance to the question of jurisdiction, or in any way affects the consideration of the statutory powers conferred upon the arbitrator.

Assuming that it was within the jurisdiction of the arbitrator to entertain the claim, I can see no reason why he should not have made an order of declaration of liability, or an order in the form proposed to be substituted by your Lordships. It has already been determined in this House in the case of *Taylor* v. *London and North-Western Railway Company* (1912 A.C. 242, 49 S.L.R. 1020) that the County Court judge may make a suspensory order either by ordering that the weekly payment should be ended until further orders or by reducing the weekly payment to a nominal amount, and the principle in this decision appears to me to apply to the present case as soon as it had been determined that the arbitrator has jurisdiction to entertain the claim. I desire to add that in my opinion neither the schedule applicable to fixing the amount of compensation nor any rules made under the authority of the Act can be construed as cutting down the jurisdiction of an arbitrator to award compensation in any case which comes within the provisions of sections 1 or 2 of the Act. The appeal should be allowed with costs.

LORD WRENBURY—On the 18th December 1915 this workman sustained personal injury by accident arising out of and in the course of his employment. On the 12th July 1917 he made an application in the City of London Court for compensation, and to the sixth particular required by Form No. 1 to the

Workmen's Compensation Rules—namely, "particulars of incapacity for work, whether total or partial, and estimated duration of incapacity"—he answered, "No incapacity at present."

The first and most important question upon this appeal is whether proceedings under the Act can be maintained when no present incapacity has resulted. It is a question which can be answered only by a careful study of the provisions of the Act.

The respondents contend that proceedings under the Act can be maintained only when four things are satisfied. There must, they say, be first an accident arising out of and in the course of the employment; secondly, resultant personal injury; thirdly, incapacity; and fourthly, loss. The contention I think is well founded, subject to the question whether incapacity includes latent incapacity, and whether loss includes probable or contemplated loss.

The section of the Act which creates liability is section 1. It provides that in an event the "employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act." The provision of the first schedule relevant to the present case is article 1 (*b*) "where total or partial incapacity for work results." The word "where" means "in a case in which" or "if and when" incapacity results. The event need not happen contemporaneously with, although it must find its origin in, the accident. If incapacity does not supervene until six weeks or six months after the accident, the language of the enactment is satisfied and there is liability. But when can proceedings be instituted in respect of the liability, and what is the meaning of the word "proceedings as used in the Act? To answer this question I turn to section 1 (3) of the Act. That sub-section speaks of a "question arising in any proceedings" and says that that question may be settled by arbitration. The "proceedings" therefore may be earlier in date than the arbitration. In other words "proceedings" does not mean arbitration proceedings to the exclusion of anything that precedes them. The proceedings may be any "proceedings under this Act"—for instance, a notice or a claim under section 2 (1), steps which are to precede what the Act calls "proceedings for the recovery" of compensation. This being premised, the exact question to be answered under this head is, I think, as to the meaning of section 1 (3). Am I to read the clause as if before the word "compensation" there were inserted the word "present" or "immediate," or as if there were inserted the words "present or future"? The words of the context are—"If any question arises in any proceedings under this Act as to the liability to pay compensation." Does this include a question as to the liability to pay future compensation in the sense of compensation in a future event, namely, incapacity arising in the future out of a present or past event, namely, the accident?

Before examining this further let me direct your Lordships' attention to another provision of the statute operative in another set of circumstances to those with which we have here to deal. Assume that the accident resulted in a present immediate incapacity and that an award was made in fixing the compensation. That award may be reviewed under Sched. I (16), and the weekly payment may be ended, diminished, or increased. Inasmuch as it "may be ended," it follows that the arbitrator if he is not satisfied by evidence that it ought to be "ended" may refuse to end it, and may make an order in some form which will keep the liability alive and enable him, if subsequent events justify that course, to make a further order for a weekly payment adequate to meet the incapacity which has developed since the time when the former order was made. In such case the arbitrator can maintain his jurisdiction so as to deal with subsequent future developments of incapacity resulting from the accident. I apprehend that your Lordships would be reluctant so to construe the Act as to exclude a similar power where no incapacity is disclosed immediately or shortly after the accident, but there is evidence that incapacity may reasonably be anticipated to result in the future.

After a careful study of the Act I have arrived at the conclusion that upon its true construction section 3 is to be read as applying not exclusively to compensation presently payable, but to compensation for incapacity resulting from the accident, whether being an incapacity presently existent or one which the arbitrator upon evidence before him finds may probably result in the future.

The respondents' contention is that the case is comparable to an action brought upon a bill which has not matured at the date of the writ or an action for rent not yet accrued due. If this is true it follows that if proceedings for arbitration were commenced before incapacity had supervened, and before the hearing incapacity had supervened, the arbitrator would be bound to dismiss the application. He would, according to the respondents' contention, have no jurisdiction. The Act did not, I think, intend any such lamentable result. There is a passage in Lord Halsbury's judgment in *Powell* v. *Main Colliery Company, Limited* (1900 A.C. 372) very pertinent to this part of the case. He there points out that there is no technical phraseology to be found in the Act. The statute, he says, deliberately and designedly avoids it. There must be a dispute, but "there is no technical phraseology by which the initiation of that dispute is pointed to." If the workman's case is that he has sustained an injury which upon medical evidence will in all reasonable probability result hereinafter in, say, epilepsy or fainting fits, or the development of an internal injury whose exact nature is at present obscure, and the employer denies that this is so, there is, I think, a "question" within the Act—a question has arisen as to the liability to pay compensation and there is jurisdiction in the arbitrator to entertain it.

The respondents in support of their contention rely strongly on section 1 (2) (*a*) of the Act, which exonerates the employer

from liability for an injury which does not disable the workman for a period of at least a week. There was no liability, they contend, at the outset, for *non constat* that disablement will continue for a week. If the workman applied, they say, on the next day after the accident he must fail because at that date there was no liability. I do not follow the argument. The most that can be said is that for a week it is not matter of certainty that there is liability. Further, the effect of section 1 (2) (*a*) is that there are some injuries by accident to which the Act does not apply. Section 1 begins by saying that the employer shall be liable for injury arising from all accidents of a defined kind, but section 1 (2) (*a*) restricts these words by excluding certain accidents from their ambit. This leaves the construction of the Act as regards injuries which do fall within it unaffected.

If this view be right the arbitrator in the present case had jurisdiction, but what order ought he to make? There was no incapacity at present. There could be no present order for payment of compensation. In such cases a practice has grown up principally (if not exclusively) in applications to review under Schedule I, article 16, to take either one of two courses, namely, either (*a*) to make an order for a nominal weekly payment of a penny a week, or (*b*) to make a declaration of liability and adjourn the question of compensation. So many orders of a penny a week have been made that your Lordships would hesitate I think to say that such an order is wrong, but I may say that I myself much prefer a form of order which does not award a nominal payment by way of compensation for a non-existent present incapacity but which recognises the true facts and postpones the question of compensation until the time arises for awarding it. If I am right in thinking that in such a case as the present (assuming that there is evidence of incapacity to be reasonably anticipated in the future) there is a dispute from which there arises jurisdiction in the arbitrator, the following, I think, results. He can adjudicate upon the questions—(1) whether there has been an accident arising out of and in the course of the employment; (2) whether the accident has resulted in personal injury; (3) whether incapacity has resulted or (if none has yet resulted) whether incapacity is upon the evidence reasonably to be anticipated as resultant in the future. In the latter case he can direct the application to stand over with liberty to either party to apply to restore. The workman could restore the application if he was in possession of evidence that incapacity had supervened. The employer could restore it if he was prepared to show that all reasonable probability of resultant incapacity was past.

In the present case the evidence was, I think, sufficient to justify such an order as I have indicated, and that was in substance though not in form the order which the County Court Judge made.

There is another point in the case dependent upon the dates. The accident was on the 18th December 1915. The arbitration proceedings were commenced on the 12th July 1917. This was long after the expiration of the six months mentioned in section 2 (1) of the Act. This in itself, however, is not material, for it was decided in this House in *Powell* v. *Main Colliery Company* that the "claim for compensation" mentioned in that section is not the initiation of arbitration proceedings but a notice of claim for compensation sent to the employer. No such notice of claim, however, was in this case sent within the six months, and the question is whether within section 2 (1) (*b*) the failure to make a claim within the six months was occasioned by "reasonable cause." Upon this part of the case there is no finding of fact by the County Court Judge. He only states his conclusion in the words that "the circumstances disclosed . . . are such as to enable me to afford the relief" provided for by section (2) (1) (*b*). It is, however, the fact that the evidence is before your Lordships and you are in a position to infer what the learned judge meant by "the circumstances disclosed." In my opinion they were sufficient to satisfy in law the words "reasonable cause;" I say "in law" because the question whether the cause which existed in fact was reasonable or not is, I apprehend, matter of law. The decision in *Luckie* v. *Merry* I think was right.

The result is that upon both points I think the appellant is right and that the appeal should be allowed. But for the form of order made in the County Court should, I think, be substituted an order approved by your Lordships.

Appeal allowed with costs. Order to be drawn up in the terms set out in the judgment of the Lord Chancellor.

Counsel for the Appellant—Rigby Swift, K.C.—Kingsbury. Agent—R. Wilberforce Allen, Solicitor.

Counsel for the Respondents — Sir J. Simon, K.C. — C. B. Marriott. Agent — Ernest Glenshaw, Solicitor.

HOUSE OF LORDS.

Friday, December 12, 1919.

(Before Lords Haldane, Dunedin, Atkinson, Wrenbury, and Buckmaster.)

VAN LIEWEN *v.* HOLLIS BROTHERS & COMPANY, LIMITED, AND OTHERS—THE "LIZZIE."

(On Appeal from the Court of Appeal in England.)

Ship — Charter-party — Construction — Custom of the Port of Hull—Demurrage.

The appellant claimed demurrage under a charter-party, clause 3 of which provided that the cargo was "to be loaded and discharged with customary steamship dispatch as fast as steamer can receive and deliver during the ordinary working hours of the respective