the workman in *M'Diarmid* v. *Ogilvy*, 1913 S.C. 1103. In *Mawdsley's* case the man was told not to oil a certain machine when it was in motion; he did oil it when it was in motion; that did not prevent him from getting compensation. In the case of *M'Diarmid* the man was told not to clean a machine except upon certain stated days; he did clean it on a different day; and it was held that what he did was not within the sphere of his employment. He was not employed to do what he did when he sustained accident. It appears to me that there was no more "added peril"—a phrase which occurs in some of the cases—in the present case than there was in the case of *Mawdsley*.

I think that when the accident happened to the workman here he was within the sphere of his employment, and that the accident arose not only in the course of but also out of the employment. Therefore I think that the question should be answered in the manner proposed by your Lordship.

LORD CULLEN concurred.

The Court answered the question of law in the negative.

Counsel for Appellant—G. Watt, K.C.—W. A. Fleming. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for Respondents—Moncrieff, K.C, —T. Graham Robertson. Agents—Gordon. Falconer, & Fairweather, W.S.

Friday, March 6.

FIRST DIVISION.

[Sheriff Court at Ayr.

CLARK *v.* GEORGE TAYLOR & COMPANY.

Master and Servant— Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16)—*Review of Weekly Payments—Liability of Employer where Accident Enforces Idleness, and Idleness Helps to Cause Obesity.*

On 7th October 1910 a workman was injured by accident arising out of and in the course of his employment. His employers admitted liability and paid him compensation down to 11th July 1913, when they ceased payment on the ground that he had recovered from the effects of his injuries. The workman then sent a memorandum of an alleged agreement to be recorded; the employers objected to the recording and applied for review of the weekly payments. The proceedings for warrant to record were sisted till the issue of the result of the application for review. On the motion of both parties a remit was made to a medical man to examine the workman and to report "(1) whether the defender has recovered from the effects of the injury to his body on 7th October 1910; (2) whether the defender is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages; (3) if not, whether he is fit for the work of a labourer on the surface, or for any other employment." On 8th October 1913 the medical man examined the workman and reported — "(1) The defender has recovered from the direct effects of his injury, but not from the indirect. (The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind.) (3) He is not fitted to undertake any work other than that of a more or less sedentary character—for example, a watchman." In response to further questions the medical man added on 15th November—"The man's incapacity for work has arisen from the fact that he has been doing no hard work during the last three years." It was admitted that the workman had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910.

Held (*dissenting* Lord Johnston) that the arbitrator was not entitled on these facts to find that the workman's incapacity for work, resulting from his injuries on 7th October 1910, had ceased on 8th October 1913, and to end as at that date the compensation.

Hugh Clark, miner, Ayr, *appellant*, being dissatisfied with a determination of the Sheriff-Substitute at Ayr (Valentine), acting as arbitrator under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in an arbitration between him and George Taylor & Company, coalmasters, Ayr Colliery, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration in which the said George Taylor & Company crave the Court to review, and on such review to end or diminish, as at 11th July 1913, weekly payments of twelve shillings and elevenpence claimed by the said Hugh Clark from the said George Taylor & Company, from the said 11th day of July 1913, during the total incapacity for work of the said Hugh Clark resulting from his bodily injuries, caused by his having been, on 7th October 1910, when he was employed by the said George Taylor & Company as a coal miner in Drumley Pit, Ayr Colliery, Annbank, accidentally crushed by a fall of coal at the coal face in said pit, the said accident having arisen out of and in the course of his said employment.

"The following *facts* were admitted, namely, that the said George Taylor & Company admitted liability to pay compensation, in terms of said Act, to the said Hugh Clark, and made an agreement with him to pay him compensation at the rate of twelve shillings and elevenpence weekly; that they paid him said sum per week from the date of said accident (7th October 1910) till the said 11th day of July 1913, when they ceased payment, alleging that the said

Hugh Clark had then recovered from the effects of said injuries, and was no longer incapacitated for work in consequence thereof; that on 14th August 1913 the law agent of the said Hugh Clark sent a memorandum of an alleged agreement made by him with the said George Taylor & Company to the Sheriff-Clerk of Ayrshire, in order that the memorandum might be recorded by the Sheriff-Clerk in the Special Register of the Sheriff Court of Ayrshire at Ayr, and the Sheriff-Clerk, on the last-mentioned date, sent a copy of the memorandum to the said George Taylor & Company in terms of paragraph 11 (1) of the Act of Sederunt, dated 26th June 1907; that on 22nd August 1913 the said George Taylor & Company sent notice to the Sheriff-Clerk that they objected to the recording of the memorandum in the Special Register on the grounds set forth in their notice; that on 29th August 1913 the said Hugh Clerk lodged a minute craving the Court for a warrant to the Sheriff-Clerk to record the said memorandum in the Special Register, a copy of which minute was duly served on the said George Taylor & Company, who on 12th September thereafter presented an application for review of the weekly payments by them to the said Hugh Clark as mentioned at the beginning of this Stated Case; that on the motion of parties the said proceedings for warrant to record the said memorandum were sisted till the issue of the said application for review of the said weekly payments; that in this application a remit, on the motion of parties, was, on the 2nd October 1913, made to Dr A. Ernest Maylard, No. 12 Blythswood Square, Glasgow, to examine the said Hugh Clark, and to report to the Court (1) 'Whether the defender' (Hugh Clark) 'has recovered from the effects of the injury to his body on 7th October 1910? (2) Whether the defender' (Hugh Clark) 'is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages? (3) If not, whether he is fit for the work of a labourer on the surface, or any other employment?' That on 8th October 1913 Dr Maylard examined the said Hugh Clark, and reported to the Court as follows:—'In reply to the questions contained in the joint-minute—(1) The defender' (Hugh Clark) 'has recovered from the direct effects of his injury, but not from the indirect (The injury having thrown the man out of work for a time, his age—sixty-three years — coupled with his disposition to obesity have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind.) (3) He is not fitted to undertake any work other than that of a more or less sedentary character — for example, a watchman.' That parties' agents were on 6th November 1913 heard on Dr Maylard's report, and on 11th November 1913 I issued an interlocutor and note stating that the exact meaning of Dr Maylard's first answer was not clear to my mind. From the report I could not determine whether Dr Maylard meant that Clark was now incapacitated from work other than that mentioned in the answer to question 3 by age and obesity, his obesity having increased on account of the fact that he had been doing no hard work during the last three years; or whether Dr Maylard meant something more than that, viz., that Clark had made so slow a recovery, and had for so long a period been incapable of any active exertion, that the natural vigour of his system had become impaired by his long illness and weakness—with the result that he was now incapable of work other than that mentioned in the answer to question 3; and that thereafter, in reply to a letter dated 14th November 1913, from the law agents of the said George Taylor & Company, written by joint consent of the parties, Dr Maylard on 15th November 1913 wrote them as follows:—'In reply to your letter of the 14th inst., the correct interpretation of my statement is embraced in an affirmative answer to the Sheriff's first question—that the man's incapacity for work has arisen from the fact that he has been doing no hard work during the last three years.' It was admitted at the Bar that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910.

"After hearing parties' agents on Dr Maylard's report and explanatory letter, I, on 2nd December 1913, in respect of the said answers of Dr Maylard and the admissions of the parties, found in fact that the said Hugh Clark by 8th October 1913 was still affected with partial incapacity for work; that his said partial incapacity for work was due to age and obesity; that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910; that the said Hugh Clark had a natural disposition to obesity; and that his obesity had increased between 7th October 1910 and 8th October 1913 owing to his having been doing no hard work; found that his partial incapacity on 8th October 1913 did not result from the injuries sustained by him on 7th October 1910; I therefore found that the incapacity for work of the said Hugh Clark, resulting from the injuries sustained by him on 7th October 1910 had ceased on 8th October 1913, and I, accordingly, ended the compensation payable by the said George Taylor & Company to him as at said date. I also found the said Hugh Clark liable to the said George Taylor & Company in six pounds six shillings sterling of modified expenses."

The *question of law* for the opinion of the Court was—"Was I entitled on the facts to find that the said Hugh Clark's incapacity for work, resulting from the bodily injuries sustained by him on the 7th day of October 1910, had ceased on the 8th day of October 1913, and to end, as at the last-mentioned date, the compensation payable to him by the said George Taylor & Company in respect of said injuries."

Argued for appellant—Although in an original application the *onus* was on the workman to show that he was injured by

accident arising out of and in the course of his employment, and similarly in a case of supervening incapacity to show that the incapacity was due to the original accident —*M'Ghee* v. *Summerlee Iron Company, Limited*, 1911 S.C. 870, 48 S.L.R. 807—on the other hand, where, as here, there had been admittedly an accident and consequent liability but no admission of recovery, the *onus* was on the employer to show that the old cause of incapacity was gone and that the workman had recovered from his injuries—*M'Callum* v. *Quinn*, 1909 S.C. 227, 46 S.L.R. 141. In any case the accident here caused the idleness, the idleness caused or was a cause of obesity, and the obesity caused or was a cause of the incapacity. Where there was a chain of causation unbroken by any new intervening cause, so that the incapacity did in fact result from the injury (*i.e.*, succeed as a consequence of the injury), the employer was liable, and it was immaterial whether the incapacity was a probable consequence or not — *Brown* v. *George Kent, Limited*, [1913] 3 K.B. 624; *Dunham* v. *Clare*, [1902] 2 K.B. 292; *Golder* v. *Caledonian Railway Company*, November 14, 1902, 5 F. 123, 40 S.L.R. 89; *Malone* v. *Cayzer, Irvine, & Company*, 1908 S.C. 479, 45 S.L.R. 351; *Ystradowen Colliery Company, Limited* v. *Griffiths*, [1909] 2 K.B. 533; *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242, Lord Loreburn, L.C., at 245; *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443, Lord Lindley at 454-6; *Garnant Anthracite Collieries, Limited* v. *Rees*, 1912, 5 But. W.C.C. 694; *Drylie* v. *Alloa Coal Company, Limited*, 1913 S.C. 549, 50 S.L.R. 350. By way of contrast they referred to *Upper Forest and Worcester Steel and Tinplate Company, Limited* v. *Grey*, 1910, 3 But. W.C.C. 424, where the idleness was not caused by the accident.

Argued for respondents—The *onus* was on the workman to show that he was incapacitated by injury from accident—*M'Ghee* v. *Summerlee Iron Company, Limited* (*cit. sup.*); *Darroll* v. *Glasgow Iron and Steel Company, Limited*, 1913 S.C. 387, 50 S.L.R. 226. In *M'Callum* v. *Quinn* (*cit. sup.*) there was a recorded memorandum of agreement, and this was the foundation of the decision (Lord Pearson at p. 229). The importance of whether or not there was a recorded memorandum was illustrated by comparing such cases as *Donaldson Brothers* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920, and *Southhook Fireclay Company, Limited* v. *Laughland*, 1908 S.C. 831, 45 S.L.R. 664. The obesity did not result from the injury. The injury did not cause the obesity. The man's natural vigour was not impaired by the accident. It was necessary for the claimant to do more than show that but for the accident he would have had capacity. He must show that the cause of the incapacity was the accident — *Dunnigan* v. *Cavan & Lind*, 1911 S.C. 579, Lord Dunedin at p. 582, 48 S.L.R. 459; *Euman* v. *Dalziel & Company*, 1912 S.C. 966, 49 S.L.R. 693; *Paton* v. *William Dixon, Limited*, 1913 S.C. 1120, 50 S.L.R. 866; *Holt* v. *Yates & Thom*, 1909, 3 But. W.C.C. 75; *Malone* v. *Cayzer, Irvine, & Company* (*cit. sup.*); *Huggins* v. *Guest, Keen, & Nettlefolds, Limited*, 1913, 6 But. W.C.C. 80; *Ystradowen Colliery Company, Limited* (*cit. sup.*); *Dunham* v. *Clare* (*cit. sup.*); *Golder* v. *Caledonian Railway Company* (*cit. sup.*); *Brown* v. *George Kent, Limited* (*cit. sup.*); *Simpson* v. *Byrne*, 1913, 6 But. W.C.C. 455. Even if the obesity were due to the accident, the incapacity was not found to have arisen from obesity alone, but from age and obesity. It could not be said the accident caused the age.

At advising—

LORD PRESIDENT—This case raises a somewhat novel question under the Workmen's Compensation Act. The workman was the victim of an accident which befell him on 7th October 1910, arising out of and in the course of his employment. His employers admitted liability and paid him compensation down to the 12th July 1913, when they ceased payment on the ground that he had completely recovered from the effects of his accident, and they asked the arbitrator to end the compensation. On the motion of both parties a remit was made to a medical gentleman to examine the workman and to report whether he had completely recovered from the effects of the accident. The questions put were — "Whether the defender (Hugh Clark) has recovered from the effects of the injury to his body on 7th October 1910?" and (2) "Whether the defender (Hugh Clark) is now, so far as said injury is concerned, fit to resume his employment as a miner and to earn full wages." To these questions the medical gentleman returned this answer—"The defender has recovered from the direct effects of his injury, but not from the indirect."

Now it is well-settled law that if the indirect results of the accident still remain compensation is still due, for complete capacity has not been restored; and therefore the medical gentleman's answer was in the negative to the two questions put to him, because I take it that it cannot now be gainsaid that under this statute, to the language of section 1, which speaks of injury by accident caused to a workman, is to be added the language of the First Schedule, which speaks of incapacity which results from the injury. "The word 'results' there, of course, does not mean succeeds in point of time. It means 'succeeds as a consequence of the injury,' and not, . . . as either the necessary or the natural or the probable consequence of the injury, but as the consequence in fact." These are the words of Lord Justice Buckley in the case of the *Ystradowen Colliery Company, Limited* v. *Griffiths*, [1909] 2 K.B. 533, at p. 537, to which we were referred, and in my judgment they lay down the law with perfect precision.

The arbitrator, however, desired to have further information upon the question put, and a second remit was made to the medical gentleman, whose report was, briefly stated, as follows:—That the workman had a natural tendency to obesity which was checked by active work; that the result of his injury was to incapacitate him from active work; that the result of his enforced abstention

from active work was to increase his obesity, with the result that when the immediate effect of the accident had come to an end he was unfit to resume his former employment as a miner working at the face, and was only fit for such sedentary employment as that of a watchman.

Now no doubt if the workman had to show that his incapacity to return to his former occupation was the direct and immediate result of the accident which befell him, he would have a very difficult case; but the law throws upon him no such obligation. All that he has to show is that his incapacity is due *de facto* to the accident which happened, and not to some new cause intervening; and however remote, however indirect, however improbable, however unnatural the result may be, nevertheless, if it is the result of the accident which befell him, he is entitled to have compensation. That appears to me to be the law as laid down in the case of *Dunham* v. *Clare*, [1902] 2 K.B. 292, by the Master of the Rolls, where he says, at p. 296—If incapacity "in fact resulted from the injury it is not relevant to say that 'incapacity' was not the natural or probable consequence thereof. The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences." "The only question to be considered is—Did . . . incapacity in fact result from the injury?"

Now here the chain of causation appears to me to be complete and unbroken. The accident occurs on the 7th October 1910. The direct consequence is that the man is incapacited from active employment. The consequence of that is that his natural tendency to obesity is accelerated and increased. The natural consequence of that is that he is unfit to go down the mine and toil at the working face—that he is only capable of being employed at other and less active work. That was substantially the chain of causation in the case of *Golder* v. *Caledonian Railway Company*, (1902) 5 F. 123, where the workman was injured about the head and back and suffered shock, the shock lowered his system, his lowered system rendered him an easy victim to a disease which was already upon him—which would ultimately, the Court found, have carried him off sooner or later. The effect of the lowering of his system due to the accident was to render him a rapid and easy victim to this disease, and it was held that his death was the result of his injuries.

The same principle, it appears to me, was laid down by Lord President (Dunedin) in the case of *Dunnigan* v. *Cavan & Lind*, 1911 S.C. 579, where he says—"The true question on the merits here is whether the man died from the accident or from a new cause which was introduced, viz., his own foolish action—to say nothing more—in persisting in leaving the hospital and going to his own house when he was suffering from acute pneumonia." The question therefore always is—Has there been a fresh cause intervening, or is the man's incapacity the result—it may be remote and indirect—of the injuries which he formerly suffered? In this case the facts appear to me to be substantially identical with the facts which were presented in the case of *Golder*. For the medical gentleman here reports that the man's incapacity for work "has arisen from the fact that he has been doing no hard work during the last three years." And the case adds—"It was admitted at the Bar that the said Hugh Clark had been incapacitated for work for a time by the accident, and that he had consequently been doing no hard work since 7th October 1910."

With these findings in fact before him, with a chain of causation which I repeat was complete and unbroken, the arbitrator "found that the incapacity for work of the said Hugh Clark, resulting from the injuries sustained by him on 7th October 1910, had ceased by 8th October 1913." That appears to me to be a distinct *non sequitur* from the arbitrator's own finding to the effect that the man had been incapacitated for work by the accident, that he had consequently been doing no hard work since 7th October, that he had a natural disposition to obesity, and that his obesity had increased owing to his having been doing no hard work.

The findings of the arbitrator therefore appear to me to state clearly a chain of causation, complete and unbroken, to negative completely the intervention of a *nova causa*, and therefore to lead to a conclusion exactly the opposite of that at which he has arrived. I am therefore for answering the question which he puts to us in the negative.

LORD JOHNSTON—This is a most difficult case to have to decide as stated by the Sheriff, and I should have felt more satisfaction in doing so had it been sent back to him to be re-stated. Clark, a miner, who is the appellant, was injured on 7th October 1910 by a fall of coal. His employers George Taylor & Company continued to pay him compensation down to 8th October 1913, when they refused to go on with the payments on the ground that Clark had completely recovered from the effects of the injury. He has recovered from the effects of the injury. But he cannot return to work at the face, not by reason of any direct effects of the accident, but by reason of age (63) and obesity, which has increased during the years of inaction which have elapsed since the accident.

The question of his employers' continued liability for statutory compensation to Clark came up on an application to record and a counter application to review. The procedure has been unusual. There has been no proof, but by consent a remit to a medical referee, and I assume that the parties are bound to accept what the referee says, as in lieu of proof. But unfortunately the referee's report leaves us without explanation as to essential facts, some of which were not within his province, as, for

instance, at what date Clark had recovered from his injuries, what was his physical condition before the accident, how far it was necessary that he should abstain from exertion before and after recovery, and others.

The referee answers three questions, and he afterwards explains his answers in reply to a letter from the Sheriff. Then there is an admission by the parties. And then the Sheriff gives his findings in fact and his conclusion. The greatest difficulty is created by the so-called admission by the parties, which to me is not intelligible. It was admitted that Clark had been incapacitated for work for a time by the accident, and that he had been "*consequently*" doing no hard work since the accident. As we are not told *what* time or anything else about the man, the scope and effect of the admission is to seek. I could understand the sequence, but the consequence needs explanation.

The finding of the Sheriff was that the incapacity of Clark for work resulting from the injuries sustained on 7th October 1910 had ceased by 8th October 1913, and he accordingly ended the compensation. The question is, was he entitled on the facts to arrive at that finding? I think that he was, and that we have no right to disturb his award.

In a case of this kind there are always two questions—1st, Did the evidence justify the Sheriff's findings in fact? But it is not for this Court to review by way of appeal the Sheriff's findings in fact. All that we can ask ourselves is, had the Sheriff evidence before him on which he could reasonably find in fact as he did?

2nd, Did the facts found by the Sheriff justify his conclusion in law—in other words was the Sheriff here, on the facts as stated by him, justified in finding that incapacity had ceased and ending compensation? That is a question for this Court.

The Sheriff's findings in fact, altering somewhat their sequence, were — 1. Clark had been incapacitated for a time by the accident. 2. Consequently he had been doing no hard work since the date of the accident, 7th October 1910. 3. Clark had a natural disposition to obesity. 4. His obesity had increased between 7th October 1910 and 8th October 1913. 5. This increase was owing to his having been doing no hard work during that period. 6. On 8th October 1913 he was still partially incapable for work. 7. This partial incapacity was due to his advanced age and to his obesity at the date last mentioned. 8. It did not result from the injuries sustained by him on 8th October 1910.

Subject to a disturbing factor to which I shall afterwards refer, I do not think that any of these findings in fact are questionable or can be altered by us. That we should do so we must be able to say (7) that this partial incapacity was not accounted for by age and obesity, but (8) that it did result from the injuries received on 8th October 1910—and that, so clearly, that we are able to say that the Sheriff has gone against evidence, or else to say that the Sheriff has misdirected himself in law and has drawn a wrong conclusion from the facts—I do not think that there is enough to justify us in doing so.

The Sheriff was told by the doctor that Clark had recovered from the direct effects of the injury, but not from the indirect, with the added explanation:—"The injury having thrown the man out of work for a time, his age—sixty-three years—coupled with his disposition to obesity have told against him, so that from lack of continuity of activity he has become less and less fit for labour of any kind."

This is, I think, quite clear, but the Sheriff was not quite satisfied that he understood what the doctor meant by the distinction "direct" and "indirect." He asked information, and in reply the doctor affirmed the proposition that Clark was now incapacitated for anything except light work by age and obesity, his obesity having increased from the fact that he has been doing no hard work during the last three years, and negatived the proposition that Clark had made so slow a recovery and had for so long a period been incapable of any active exertion that the natural vigour of his system had become impaired by his long illness and weakness, with the result that he was now incapable of any but light work.

On that assumption I think that the Sheriff had enough before him to justify his conclusions in fact, or it may be in fact and law, 7 and 8. It is immaterial whether we would have come to the same conclusion, though personally I should have done so.

The only difficulty arises from the very unsatisfactory finding to which I have already alluded, based on an equally unsatisfactory admission of the parties, viz., that Clark had been incapacitated *for a time* by the accident, and *consequently* had been doing no hard work since 7th October 1910. The one thing is not necessarily or logically a consequence, though it may be a sequence of the other. But though I should have preferred to know definitely what is the meaning of the admission, and of the finding of the Sheriff based upon it, I do not think that the certain vagueness which this defect leaves affects the conclusion of the Sheriff when the statement of the medical referee is regarded.

I do not quite know whether your Lordship considers that the Sheriff has merely drawn a wrong conclusion, and one which could not reasonably have been drawn from the facts, or whether you think that misapprehending the law he has equally misconstrued the facts.

Under the combined operation of the Act and the First Schedule, in order to support a claim for compensation, incapacity for work must result from injury occasioned by accident arising out of and in the course of the employment. The Sheriff thinks that the partial incapacity here results not from the injury occasioned by the accident, but from age and increased obesity. The opposite view is that there is an unbroken chain of causation. The accident caused the injury, the injury caused the abstinence from work, the abstinence from work caused the increase of obesity, and the increased obesity

the partial incapacity. It has sometimes been said that there is grave danger in administering this Act, lest each judgment advancing a little on the last should carry matters to a point which the statute itself never intended. The term "chain of causation" is a neat and expressive phrase. But I think that its indiscriminate use is not unlikely to aid in the onward course which has been deprecated. I think its use here would be indiscriminate, and it can hardly be denied that its application leads to an extravagant result. It is not even suggested that the appellant is suffering from any definite disease in which obesity plays a part, as fatty degeneration of the heart, &c. He has merely a natural tendency to lay on adipose tissue if he does nothing to keep himself in condition, and he is now sixty-three years of age. If we are to regard the chain of causation, we must, I think, regard it strictly, and see that we do not have the legitimate strain crossed by other strains of causation. Here we have the other causes —advancing years and a natural tendency to obesity. The medical referee, though abstaining from the language of logic, is equally accurate and more easily followed where he says that Clark had recovered from the direct but not from the indirect effects of the injury. It is only for direct effects, or for effects in the direct line of causation, that I think the employer is liable under the Act.

The phrase the chain of causation was first, I think, used in *Dunham* v. *Clare*, [1902] 2 K.B. 292, where it was found that death may be the result of the injury even though in fact it may neither be the natural or the probable consequence of it. But consider the circumstances, and one at once sees how close and direct even the unexpected consequence was. A man had received an injury to his toe, erysipelas in the wound might have followed immediately, or at least within a week of the injury. It did not do so, but it supervened about a fortnight after, in which case, according to the best opinion, it must have been related, not to the original wound, but to a reopening of the wound, probably caused by the man walking to and fro to hospital to get his wound dressed. The present case is at least very wide of these circumstances.

Again, in *Ystradowen Colliery Company*, [1909] 2 K.B. 533, we have a still more instructive case. Disease ensued upon the accident, though not directly related to the injury, as thus:—A workman was severely injured by a fall of the roof. He had to drag himself home a considerable distance on an inclement evening in his suffering and weakened condition. He caught a severe cold, which developed into bronchitis, and this produced chronic asthma, from which he had not before suffered, and he became thereby incapacitated from work. The essential question whether the incapacity was in fact caused by the accident was presented in this form—Was the man's present condition the result of the accident in the sense that it was occasioned by his debilitated condition immediately after the accident, and so occasioned by the accident? And it was answered in the affirmative. There is no indication in the statement of the case of anything so remote from the accident and the injury as we have here.

There have also been some cases in Scotland more or less bearing on the point. In *Malone*, 1908 S.C. 479, where there was supervening insanity and suicide, the Court merely held that the case was not so clearly irrelevant as to exclude inquiry. In *Euman's* case, 1913 S.C. 246, a fall resulted in direct and painful injury to the ankle, but also in general shock to system. The injury to the ankle improved, but the patient continued to suffer and was in a low state. He was suddenly seized with acute internal pain and died of appendicitis. The Court held merely that there was evidence to support an award. There was continuous suffering, and no one could competently dissociate the final result from the general shock from the accident, though it had nothing to do with the patent external injury.

In the case of *Dunnigan*, 1911 S.C. 579, again, we get a distinction which exactly covers this case. It was there laid down that the Sheriff was not entitled to ask himself whether ***but for*** the accident death or incapacity would not have resulted, but only whether ***as matter of fact*** they did result from the accident.

The present case is only one where at best it may be said that but for the accident incapacity would not have occurred when it did, and not one in which it can be said *as matter of fact* that it did result from the accident.

For these reasons I do not think that there is any ground for disturbing the Sheriff's award.

LORD SKERRINGTON—I am of opinion that upon the facts which the arbiter has held to be established he ought to have found that the appellant's present partial incapacity resulted from the injuries sustained by him on 7th October 1910. The chain of causation is unbroken, and the links are as follows—(1) The injuries above referred to, (2) total incapacity resulting from these injuries and continuing for a period not specified by the arbiter, (3) enforced idleness during said period, (4) obesity increasing during this period caused by such idleness and by a natural disposition to obesity jointly, and (5) permanent incapacity for active work caused by such obesity and by old age jointly, and commencing at or prior to the termination of said period. It is immaterial that two causes for which the respondents are not responsible contributed to the final result, viz., a natural tendency to obesity and old age. The arbiter has not found that any new cause intervened subsequent to the accident to which, in his opinion, the appellant's condition of partial incapacity ought to be attributed—such as the appellant's failure to take reasonable means to counteract his tendency to obesity, or his having aggravated the tendency by following bad medical advice, or his having reached an age at which active work would have been impossible even if he had not been obese. The sole ground, as I understand,

upon which the arbitrator has proceeded is the fact that the obesity was not caused by any physiological or pathological condition of the appellant's body caused by the original injuries, but was caused by a fact of a different order, viz., the appellant's enforced idleness for a prolonged period during which his natural tendency to obesity operated so as to produce permanent incapacity for active work. This distinction is, in my view of the statute, irrelevant, though it might have been most material if the inquiry had been whether the obesity was a natural result of the injuries or whether the injuries were the proximate cause of the obesity. I am of opinion that the question of law should be answered in the negative.

LORD MACKENZIE was absent.

The Court pronounced this interlocutor:—

"... Answer the question of law in the Stated Case in the negative: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to proceed as accords, and to deal with the question of expenses of new: Find the appellant entitled to expenses of the Stated Case. ..."

Counsel for the Appellant — Moncrieff, K.C.—A. M. Stuart. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents —Horne, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, March 17.

(Before the Lord Justice-General, Lord Salvesen, Lord Skerrington, Lord Hunter, and Lord Anderson.)

H. M. ADVOCATE *v.* RYAN.

Justiciary Cases — Incest — Indictment — Relevancy — Intercourse between Panel and His Brother's Wife — Act 1567, *cap.* 14—*Leviticus, cap.* 18, *ver.* 16.

A person was charged on indictment with incest by having sexual intercourse with his brother's wife during the lifetime of his brother.

Held (by a Full Bench) that the libel constituted a crime according to the law of Scotland, and that the indictment was relevant.

The Act 1567, cap. 14, enacts—"Quhatsumeuer persoun or personis committeris of the said abhominabill cryme of incest, that is to say, quhatsomever persoun or personis thay be that abusis thair body with sic personis in decre as Goddis word has expresslie forbidden in ony tyme cuming as is contenit in the xviij cheptour of Leuiticus, salbe puneist to the death."

Leviticus, chap. 18, verse 16 (according to the authorised version of the Scriptures), is as follows:—"Thou shalt not uncover the nakedness of thy brother's wife, it is thy brother's nakedness."

Martin Ryan was charged on indictment at the Circuit Court at Glasgow, on February 26th 1914, with having incestuous intercourse with his brother's wife, "contrary to Act 1 James VI, cap. 14, and the 18th chapter of Leviticus therein referred to."

After hearing counsel for the panel, who objected to the relevancy of the indictment, Lord Skerrington certified the case for hearing by a fuller Bench.

At the subsequent hearing before a Full Bench on March 9th 1914, argued for the panel—The indictment disclosed no relevant charge of incest. It would be inconsistent with the decision in *H. M. Advocate* v. *A B*, November 21, 1913, 51 S.L.R. 83, to hold that there was a crime. The same degree of relationship existed in both cases, and this was merely the converse case to that in the previous decision. Further, it was contrary to the modern view that there could be incest where the parties were only related by affinity and not by blood. This was recognised in the recent English Act (8 Edw. VII, cap. 45). The old cases reported in Hume on Crimes, i, 449, had proceeded on a wrong view of the law. It was held in the case of *A B, supra*, that verse 18 of the chapter in Leviticus was not one of the prohibitions struck at by the Act 1567, and that it merely referred to the practice of polygamy. Verse 16, founded on in this case, was likewise outside the scope of the Act, because it merely referred to the practice of polyandry. As to the existence of polyandry in early times, counsel referred to Westerwarck on History of Human Marriage (1901), and Robertson Smith on Kinship and Marriage (1903). Intercourse within the degrees mentioned in verses 6 to 15 was alone struck at by the Act 1567. Verse 17 was in the same position as 16 and 18—Erskine's Institutes, 4, 4, 56. It was not consistent with the view that this intercourse was regarded as incestuous that under the Jewish law a man was enjoined to marry his brother's widow.

Argued for the Crown—The indictment was relevant. The act of sexual intercourse here charged was that which was directly and without ambiguity prohibited in Leviticus, chap. 18, verse 16. That verse was plainly one of the series of verses referred to in the Act of 1567, and was not open to the same observations which had been successfully urged in *H. M. Advocate* v. *A B, supra*, for excluding verse 18 from the scope of the Act.

At advising—

LORD JUSTICE-GENERAL—In this case we are invited, not for the first time this session, to determine the true scope and meaning of the old Scots Act of Parliament of 1567, cap. 14. It is a highly penal statute, and ought, we are all agreed, to receive the strictest interpretation. But applying to it the most rigid canons of construction I am constrained to hold that this indictment is relevant, for the statute expressly provides that "Quhatsumeuer persoun or personis thay