LORD PRESIDENT—This application is presented under section 1 of the Evidence by Commission Act 1859 (22 Vict. cap. 20), with reference to proceedings before an Indian Court for an order to examine a witness in Scotland. It is presented by the attorney appointed by the Comptoir National d'Escompte de Paris, Bombay, a party to the proceedings in question, on whose behalf the examination of the witness is desired. The application proceeds on a note and letter of request issued by the Indian Court and addressed to this Court. The applicant specially craves that the Sheriff or Sheriff-Substitute of the jurisdiction within which the witness is resident should be appointed by this Court to take the evidence. In moving for the order counsel for the applicant very properly referred us to the cases of *Baron de Bildt*, 1905, 7 F. 899, and the *Lord Advocate*, 1909 S.C. 199.

Those cases dealt with the analogous case of an application for an order to examine a witness under the Foreign Tribunals Evidence Act 1856 (19 and 20 Vict. cap. 113). The provisions of that Act (dealing with orders for the examination of witnesses in Scotland with reference to proceedings in foreign courts) closely resemble those of the Evidence by Commission Act 1859 (dealing with similar orders in connection with proceedings pending in courts in His Majesty's Dominions). The Foreign Tribunals Evidence Act 1856 (section 1) provides for the granting by this Court of an order for the examination of the witnesses by a "person or persons" named in such order—that is to say, for a commission of the usual kind in favour of a commissioner or commissioners named by this Court, not for a remit to a court either of superior or inferior jurisdiction. Accordingly in *Baron de Bildt's* case the crave for an order on the Sheriff or Sheriff-Substitute was necessarily regarded as no more than a suggestion and the commission was granted to a member of the legal profession in the usual way. In the *Lord Advocate's* case the request of the foreign Court for an order on the Sheriff or Sheriff-Substitute was conveyed through the Foreign Office, and the application was made by the Lord Advocate. The request being presented in the King's name was granted by this Court.

The Evidence by Commission Act 1859 (differing in this particular from the Foreign Tribunals Evidence Act 1856) contemplates in section 1 that the Dominion Court may itself appoint a "person or persons" to take the evidence required, but the Court did not in the case before us purport to exercise this power. I accordingly express no opinion as to what would have been the position if the Indian Court had appointed the witness to be examined before the Sheriff or Sheriff-Substitute of the place where he resided. In point of fact the request for a remit to the Sheriff or Sheriff-Substitute comes, not from the Indian Court, but from the party who desires the evidence. Seeing that we are free to deal with the matter as we think proper I see no reason why we should impose this duty upon a Sheriff. On the contrary I think that we should proceed in the ordinary way and grant a commission to a member of the Bar.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court granted commission to Lord Kinross, Advocate, to take the evidence of the witness named in the petition.

Counsel for Petitioner — Mackintosh. Agent—Herbert Mellor, S.S.C.

Friday, June 29.

SECOND DIVISION.

[Sheriff Court at Greenock.

CARR *v.* BURGH OF PORT GLASGOW.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1)—*Injury by "Accident"—Bursting of Blisters on Hand—Subsequent Septic Poisoning Causing Incapacity—No Proof that Septic Poisoning Took Place during Working Hours—Whether Incapacity Due to the Original Injury or to a Novus actus interveniens—Onus of Proof.*

A labourer while working with pick and shovel blistered his left hand. He continued to work without protecting his hand by bandage or otherwise, with the result that the blisters burst. His hand having subsequently suppurated in consequence of dirt getting into it he became temporarily incapacitated for work. There was no evidence as to whether the dirt had entered his hand during working hours or not. The arbitrator refused compensation. *Held* (*diss.* Lord Hunter) that the arbitrator was not entitled to hold that the workman had not sustained injury by accident within the meaning of the Act.

In an arbitration under the Workmen's Compensation Act 1906 between Thomas Carr, labourer, Port Glasgow, *appellant*, and the Provost, Magistrates, and Councillors of the Burgh of Port Glasgow, *respondents*, the Sheriff-Substitute (MERCER) refused compensation and at the request of the claimant stated a Case for appeal.

The *facts* admitted or proved were as follows—"(1) That the appellant entered the employment of the respondents as a labourer under their scheme of relief work for unemployed persons on 26th April 1922; (2) that when he started work his hands were in a soft condition owing to his having been previously unemployed for a considerable time; (3) that by 2nd May the friction of the pick and shovel which he was using caused blisters to form on his left hand; (4) that notwithstanding said blisters he continued to work without protecting his hand by bandage or otherwise; (5) that prior to 11th May, in the course of his work, the blisters burst; (6) that he continued to work with the respondents until 11th May; (7) that on that date he ceased work owing to suppuration of his hand through dirt having

got into it where it had been blistered; and (8) that in consequence of the condition of his said hand the appellant was partially incapacitated for work for a period of ten weeks."

The Case further stated—"Upon these facts I held that the appellant had not proved that he had sustained injury by accident within the meaning of the Workmen's Compensation Act 1906, and refused the crave of the petition, with expenses to the respondents."

The *question of law* for the opinion of the Court was—"Whether upon the facts stated I was right in holding that the appellant had not sustained injury by accident within the meaning of the Workmen's Compensation Act?"

The arbitrator's *note* was as follows:—"The question whether the pursuer suffered an injury by accident within the meaning of the statute must in my opinion be answered in the negative. 'Accident,' it was laid down by the House of Lords in *Fenton* v. *Thorley* (1903 A.C. 443) is used in the statute 'in the popular or ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not looked for or designed.' Can it be said that the pursuer's disability was the result of an unlooked-for occurrence? His own medical witness, Dr Connell, gives the answer. The pursuer's hands, he said, seemed to be in a soft state and blisters would be a natural development of the condition of pursuer's hands at the time; continuing at work after the blister had formed would lead to a septic condition; deleterious matter must have got in through the soft skin in some way; there had been no cutting of the skin; the condition, he said, was just a natural change from one stage to another. The soft condition of pursuer's hands and that sequence of developments are confirmed by the pursuer himself and the other witnesses. It accordingly seems clear on pursuer's own proof, as I think it is in fact, that there was nothing unlooked for in any of the series of events that led up to pursuer's incapacity, and so nothing of accident in the popular or ordinary sense of the word. I have therefore held that pursuer's incapacity was not due to accident within the meaning of the statute.

Argued for the appellant—A physiological injury resulting from the employment was an accident in the sense of the statute—*Stewart* v. *Wilsons and Clyde Coal Company, Limited*, (1902) 5 F. 120, 40 S.L.R. 80; *Fenton* v. *Thorley & Company, Limited*, [1903] A.C. 443; *Euman* v. *Dalziel & Company*, 1913 S.C. 246, 50 S.L.R. 143; *Saddington* v. *Inslip Iron Company, Limited*, (1917) 10 B.W.C.C. 624. Here the bursting of the blisters was an accident; the fact that the soft condition of the man's hands caused the blisters did not take it out of that category—*Ismay, Imrie, & Company* v. *Williamson*, [1908] A.C. 437; *Clover, Clayton, & Company, Limited* v. *Hughes*, [1910] A.C. 242; *Dotzaner* v. *Strand Palace Hotel, Limited*, (1910) 3 B.W.C.C. 387; *M'Innes* v. *Dunsmuir & Jackson*, 1908 S.C. 1021, 45 S.L.R. 804. The entrance of dirt into the wounds was a natural consequence of the bursting of the blisters, and the fact that incapacity was due to an aggravation of the original injury did not disentitle the appellant to compensation—*Dunham* v. *Clare*, [1902] 2 K.B. 292; *Malone* v. *Cayzer, Irvine, & Company*, 1908 S.C. 479, 45 S.L.R. 351; *Thomson* v. *Mutter, Howey, & Company*, 1913 S.C. 619, 50 S.L.R. 447; *Laverick* v. *William Gray & Company, Limited*, (1919) 12 B.W.C.C. The accident on which the appellant's claim was based was the bursting of the blisters. If, however, it were held that the accident was the entrance of dirt into the wounds, the facts proved would justify the Court in reaching the conclusion that this occurred while the appellant was engaged in work—*Grant* v. *Kynoch*, 1919 S.C. (H.L.) 62, 56 S.L.R. 345.

Argued for the respondents—The appellant must prove that his incapacity resulted from an accident arising out of and in the course of his employment. If there was any accident in the present case, it was the entry of dirt into the wounds which caused the incapacity, and there was no finding connecting this with the appellant's employment. Such a finding was essential to his success—*Bellamy* v. *J. Humphries & Sons, Limited*, (1913) 6 B.W.C.C. 53, contrasted with *Adams* v. *Thompson*, (1911) 5 B.W.C.C. 19. There was, however, no accident in the sense of the statute in this case. An accident must be a fortuitous event. Neither the bursting of the blisters nor the subsequent infection were in any sense fortuitous or unexpected events. They followed naturally from the soft condition of the man's hands. In particular, the infection was a natural consequence of the man's conduct in continuing at work with burst blisters on his hand. He knew or ought to have known that this result would follow. That being so, he had not sustained an accident in the sense of the statute—*Dennis* v. *Midland Railway Company, Limited*, (1921) 14 B.W.C.C. 69; *Pyper* v. *Manchester Liners, Limited*, [1916] 2 K.B. 691, *per* Pickford, L.J., at p. 697. The cases of *Ismay, Imrie, & Company* v. *Williamson* (*sup. cit.*) and *Dotzaner* v. *Strand Palace Hotel, Limited* (*sup. cit.*) were distinguishable, because in those cases special knowledge would have been required to enable the workman to foresee the results of his conduct, whereas what had occurred in the present case was a matter of common knowledge.

On 22nd May 1923 the Court remitted to the Sheriff-Substitute as arbitrator to report whether or not he found that the dirt referred to in finding (7) of the Stated Case had entered the applicant's wounded hand during working hours or during hours when he was not at work.

On 30th May the Sheriff-Substitute reported that he was unable on the evidence to make any finding as to whether the dirt referred to entered the applicant's hand during working hours or during the hours when he was not at work.

The case was further heard on 23rd June, when the appellant argued—The accident in the present case was the bursting of the

blisters, and the fact that incapacity was due to a subsequent aggravation unconnected with the employment did not disentitle the appellant to compensation — *Dunham* v. *Clare* (*sup. cit.*); *Saddington* v. *Inslip Iron Company, Limited* (*sup. cit.*); *Laverick* v. *William Gray & Company, Limited* (*sup. cit.*).

Argued for the respondent—Where the incapacity was the result of supervening infection, as in the present case, that infection constituted the accident, and must in order to found compensation have been sustained in the course of the employment—*Grant* v. *Kynoch* (*sup. cit.*), *per* Birkenhead, L.C., at p. 65.

At advising—

LORD JUSTICE-CLERK—The learned arbitrator's findings in this case are brief. They are as follows:—[*His Lordship then quoted the findings set forth in the Stated Case*].

On these findings two questions arise for decision. To the first the learned arbitrator has addressed himself, to the second he has not. The first is, Did the appellant sustain "injury by accident" within the meaning of the Workmen's Compensation Act? The second is, If he sustained injury by accident, did his incapacity "result" from that injury.

To the first question the arbitrator has returned a negative answer. In so doing I am of opinion that he erred in law. The appellant contended that the bursting of the blisters—an incident which the arbitrator finds occurred in course of his work—was an accident in the sense of the Act. In my judgment that contention is sound. If I entertained any doubt in the matter, it would be set at rest by the decision of the Court of Appeal in *Saddington*, 10 B.W.C.C. 624. There the Court held that the finding that the applicant's work caused a chilblain in his hand to split amounted to a finding of an accident arising out of and in course of his employment. I refer in particular to Lord Justice Warrington's opinion (at p. 632), where his Lordship says—"I think the first of the findings means—and if it does not mean it I think the judge ought to have found it—that the open wound was an injury caused by accident arising out of and in the course of the employment." And again, Scrutton, L.J. (at p. 633) says—"We find he [the workman] had a frost-crack which in the period the judge mentions opened and bled. It seems to me on these findings one has an accident arising out of and in the course of the employment. It does not need a great deal of knowledge of human nature to know if you work with a frost-crack you may very likely open it and make it bleed, and the opening and making to bleed of such a frost-crack appears to me to be an accident arising out of and in the course of employment." I am unable to see that there is any material distinction between the bursting of a chilblain and the bursting of a blister. If the one is an accident within the meaning of the Workmen's Compensation Act, so too is the other. I accordingly consider that by the bursting of the blisters on his hand the appellant in this case sustained injury by accident within the meaning of the Workmen's Compensation Act.

But that does not conclude the matter. There remains the question—to which, as I have said, the arbitrator's attention was not directed, and which in the view he took it was perhaps unnecessary for him to consider—viz., whether the incapacity from which the appellant suffered resulted from the accident. Now the arbitrator's original findings did not disclose whether the germ which entered the burst blister and made it septic invaded the appellant's hand during working hours or outside of them, and the Court thought proper to remit to the arbitrator requesting him to answer that question. His reply is that the evidence is silent on the matter. Therefore the case must be decided on the footing that it is uncertain whether the germ entered the wound during or outside of working hours.

Even so, I am of opinion that the appellant is entitled to succeed. The principle upon which decisions in this class of case rest is not in doubt. Any difficulty arises, as so often happens, not in regard to the principle to be applied, but in regard to the application of the principle to the circumstances of the case in hand. The principle may be expressed interrogatively thus—"Is the condition of the workman due to the original accident or to a *novus actus interveniens?* Or, as it was put in *Doolan* (11 B.W.C.C. 93) in a passage in Bankes, L.J.'s, opinion (at p. 101), which was expressly approved by the Master of the Rolls in *Laverick* (12 B.W.C.C. 176, at p. 181)—"Is the workman's condition of which he is complaining in fact due to the original injury, whatever it was, aggravated by infection or disease? Or is his condition in fact due to infection or disease quite independent of the original injury?" I am unable to affirm that the incapacity of the appellant in this case was due to infection or disease quite independent of the original injury. Had the blisters not burst there would have been no incapacity. Accordingly that incapacity cannot be regarded as due to a cause independent of the original injury. In other words, I am of opinion that the chain of causation which bound the accident to the incapacity was not broken by a *novus actus interveniens.*

The case appears to me to be *a fortiori* of *Laverick.* There the workman contracted syphilis after the date of the accident. The Court treated the syphilitic condition of the workman as an aggravation of the accident, not as a *novus actus interveniens*, and held that he was entitled to succeed in his claim. So too in *Dunham* ([1902] 2 K.B. 292]), where erysipelas supervened upon an abrasion which was admittedly an accident, the Court refused to treat the invasion of the germ which caused the erysipelas as breaking the chain of causation which bound the accident to the death of the workman. The Master of the Rolls said (at p. 296)—"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." I cannot think that in this case the old cause has gone and a new one is substituted for it. The old cause, viz., the bursting of the blisters, was essential to the incapacity which supervened, and which would not apart from it have supervened. I may add that the reasoning in *Dunham* was in terms approved and adopted by the First Division in *Malone*, 1908 S.C. 479.

If it be said that it is uncertain whether the microbe entered the appellant's hand during working hours or no, the answer is, I have come to think, that it is immaterial. Once you have an accident arising out of and in the course of employment, the manner in which it is aggravated becomes irrelevant. The syphilis in *Laverick* and the erysipelas in *Dunham* supervened outside working hours, but that did not affect the result. As Scrutton, L.J., said in *Saddington's* case (at p. 634)—"It is enough that it [the incapacity] results, although it was not the natural and probable consequence, nor was it the sole and unassisted consequence, for if the accident partially causes the incapacity it does not matter that some other cause has come in and increased the incapacity by acting on the incapacity caused by the accident." In this case there can be no doubt that the bursting of the blisters partially caused the incapacity of the appellant, for apart from the incident there would have been no incapacity. In short, the bursting of the blisters provided the breeding ground for the microbe which caused the blood poisoning. And again, Buckley, L.J., says in *Ystradowen Colliery Company* ([1909] 2 K.B. 533, at p. 537)—"Further, it [incapacity] need not, I think, be the consequence of the injury alone. It may be the consequence of the injury and of something else, at any rate where that something else would not have existed but for the accident." These words, I think, apply in terms to this case.

Moreover, the question of onus of proof remains to be considered. In *Saddington* Scrutton, L.J., says, following the decisions in *Marshall* ([1910] 1 K.B. 79) and *Bower* (10 B.W.C.C. 146) that "once you get an accident causing injury and subsequent injury in that part which is damaged by the accident, if the employer wishes to say 'the subsequent injury is due to a new cause' the burden of proof of showing that is on him, and if the evidence merely is it may have been due to the accident, or it may be due to a new cause, the employer has not satisfied the burden put upon him." In this case the employer has not, in my opinion, discharged the onus which rested upon him of showing that the appellant's incapacity was due to a new and independent cause. The chain of causation is therefore complete, and there is no room for the application of the doctrine of *novus actus interveniens*.

The question appended to the case is somewhat unhappily expressed. It should run —"Whether upon the facts stated I was entitled to hold that the appellant had not sustained injury by accident within the meaning of the Workmen's Compensation Act." So put, I suggest to your Lordships that the question should be answered in the negative.

LORD ORMIDALE—It is necessary in order to found a right to compensation that a workman should prove that he has sustained an injury by accident arising out of and in the course of his employment. The learned arbitrator has held that the appellant has not discharged that onus in respect that the series of incidents which in the end rendered him unfit for work did not instruct at any stage an accident within the meaning of the statute. Counsel for the appellant contended, on the contrary, that in the sequence of events which led up to his incapacity there were two which fell within the meaning of the word "accident" as that term has been explained in the authorities—first, the bursting of the blisters on the appellant's hand, and second, the septic poisoning of the hand. He founded mainly, however, on the first of these, and as the arbitrator on a remit made to him has reported that he is unable on the evidence to make any finding as to whether the dirt referred to in the seventh finding in the case entered the appellant's hand during working hours or during the hours when he was not at work, the septic poisoning is clearly ruled out of Court as an accident arising out of and in the course of the employment.

By the bursting of the blisters it seems to me clear enough that the appellant sustained a hurt—"a physiological injury as the result of the work he was engaged in," to adopt Lord M'Laren's expression in *Stewart*, (1902) 5 F. 120, at p. 122. It may have been apparently of a trivial nature, but it was as the event disclosed of potential gravity. Whether it was an injury by accident is a more difficult question, but in my opinion it was. No doubt when he sustained it the appellant was working in the ordinary way and with the usual appliances, but as I read the findings in fact the bursting of the blisters was a fortuitous and unlooked-for happening, a mishap not expected by the workman and certainly not designed by him—*Fenton* v. *Thorley & Company*, [1903] A.C. 443. The case of *Saddington* (10 B.W.C.C. 624) supplies an illustration of a not very dissimilar happening. In that case the workman suffered from a frost crack on his hand, and the splitting of the frost crack in the course of his work was held to be an accident within the meaning of the statute. I cannot distinguish the case of *Saddington* from the present.

If, then, by the bursting of the blisters the appellant sustained an injury by accident within the meaning of the Workmen's Compensation Act 1906, the only question put to us by the arbitrator falls to be answered in the negative. But the further question was debated whether the incapacity from which he afterwards suffered resulted from this accidental injury to his hand. I agree with your Lordship that it did. The arbitrator finds that the blisters burst prior to the 11th May—how long prior

he does not say; that the appellant continued to work until 11th May; "(7) that on that date he ceased work owing to suppuration of his hand through dirt having got into it where it had been blistered; and (8) that in consequence of the condition of his said hand the appellant was partially incapacitated for work for a period of ten weeks." These findings can only mean, it seems to me, that without the original injury to the hand the dirt would and could not have got into it. The original injury had, so to speak, prepared the ground for the onset and invasion of the septic germ, and the poisonous dirt did no more by its entry than cause additional damage to an already damaged hand. The invasion of the germ was in no sense, in my judgment, the sole cause of the damage—*Dunham*, [1902] 2 K.B. 292; *Malone*, 1908 S.C. 479; *Thomson*, 1913 S.C. 619; *Laverick*, 12 B.W.C.C. 176; *Brown*, 6 B.W.C.C. 725; *Euman*, 1913 S.C. 246. Without the bursting of the blisters, *i.e.*, the injury by accident, there would have been no incapacity. If that be so, then it is immaterial where and when the poison germ got into the wound—(see cases *supra cit*). That would only be of importance if its onset amounted to a *novus actus interveniens* which severed the chain of causation between the original injury and the resulting incapacity and was itself the cause of the incapacity, independent of the original injury. It was for the employers to prove any such *novus actus*, and in my opinion they have completely failed to do so.

LORD HUNTER—Accepting the arbitrator's findings in fact as sound, which I am bound to do, I am unable to say that he erred in law in reaching the conclusion which he did.

The appellant when engaged in work as a labourer blistered his left hand. In due course the blisters burst, but from the note by the arbitrator it appears that there had been no cutting of the skin. The bursting of the blisters did not incapacitate the appellant, who continued at his work. Some time after this occurrence the hand suppurated in consequence of dirt having got into the hand through the soft skin. On findings as they originally stood it was not certain whether the arbitrator had reached any conclusion as to whether dirt entered the appellant's hand during working hours or during hours when he was not at work. We accordingly remitted to the arbitrator to indicate what conclusion he had drawn on this question of fact. The answer we have received is that he is unable on the evidence to make any finding upon this point. Owing to the suppurated condition of his hand the appellant was partially incapacitated for work for a period of ten weeks.

As regards what the arbitrator finds proved to have occurred to the appellant when at work, I agree with the view which he has expressed, that it cannot properly be described as an injury by accident within the meaning of the Workmen's Compensation Act. The formation of a blister on a hand in a soft condition and the bursting of the blister without cutting the skin does not appear to be anything other that what one would expect to occur in the ordinary course of work. It cannot fairly be said to be "a mishap or untoward event not expected or designed," which was held in the House of Lords in *Fenton* v. *Thorley & Company* ([1903] A.C. 443) to be the criterion of accident, using that word, as it is used in the statute, in its ordinary and popular sense. It is said, however, that the decision in *Saddington* v. *Inslip Iron Company* (10 B.W.C.C. 624) justifies us in holding that the bursting of the blisters amounted to an accident within the meaning of the Act. In that case a workman who had chapped or chilblained hands was employed to shovel up and screen calcined ore. The work caused a frost-crack in his hand to open and bleed so much that he had to get his hand bound up with his handkerchief. On the following day septic poisoning set in, and for a time he was unable to work. The Court held that the splitting of the frost-crack amounted to an accident within the meaning of the Act. It may be that the distinction between what occurred in that case and what occurred in the present case is only a matter of degree, but I think that this is not unimportant. It is, however, to be observed that the arbitrator in that case found that the microbes which set up the septic poisoning resulting in incapacity entered the frost-crack during working hours. His decision against the workman was based upon his inability to trace the origin of the microbes. He thought they might have come from the calcined iron dust, the handkerchief, or the dirt which would in ordinary course be on the applicant's hand, and therefore held himself debarred from reaching the conclusion that the injury by accident had arisen out of the employment. The Court of Appeal found that he was wrong in so holding. Lord Justice Swinfen-Eady in the course of his opinion said (at p. 631)—"In my judgment it is not necessary for the decision of the case to determine the exact origin of the microbes that entered the man's hand. It is sufficient to say that the conditions which are proved are such as to lead to the inference that the hand was poisoned during the time the judge finds that it was, and poisoned from the entrance of the microbe during that time. The result is this, that the man's incapacity to work with his poisoned hand results from the injury, from the crack opening and becoming poisoned."

On the assumption that I am wrong in the view that the bursting of the blisters on the appellant's hand was not an accident, I am still unable on the findings of the arbitrator to say that the appellant's incapacity was in any reasonable sense due to that circumstance. The contrary view is maintained on the following line of reasoning:—The bursting of the blisters was an accidental injury sustained in the course of the employment. But for this microbes would not have entered and the hand would not have suppurated with resulting incapacity. An onus, it is argued, is therefore placed

upon the employers to show that the incapacity did not result from the injury but from a new and independent cause. Reliance for this contention was placed by the appellant mainly upon three English cases decided by the Court of Appeal, *i.e.*, *Dunham* v. *Clare*, [1902] 2 K.B. 292; *Saddington* v. *Inslip Iron Company*; and *Laverick* v. *William Gray & Company*, 12 B.W.C.C. 176. In the first of these cases a man received injury by a heavy pipe falling upon his foot inflicting a wound on the toe. He was treated for this wound as an out-patient at the hospital. After a certain interval erysipelas set in, and he died of blood-poisoning caused by the erysipelas. In the course of his opinion the Master of the Rolls (Collins) said (at p. 295)—"In the present case there was admittedly an accident causing injury, and the only question is whether death in fact resulted from the injury. If death in fact resulted from the injury, it is not relevant to say that death 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."

In *Laverick's* case a workman had the middle finger of his left hand badly crushed. The wound progressed favourably for about three weeks when symptoms of blood-poisoning appeared, and a fortnight later the finger had to be amputated. It was afterwards found that the workman was suffering from syphilis, which must have been contracted subsequent to the original injury. The County Court Judge found on the medical evidence that the workman's incapacity at the date of the arbitration was not due entirely to syphilis but to the original injury aggravated by the infection, and that there was no *novus actus interveniens*. He therefore awarded compensation, and his award was sustained in the Court of Appeal on the ground that there was evidence to support the finding and no misdirection. In the course of his opinion Swinfen-Eady, M.R., said (at p. 180)—"It does not appear from any evidence that the workman ever recovered from the injured finger. . . . The fact of the injury and subsequent incapacity are not in dispute, but the employers say that the cause of the condition of the finger becoming serious, its requiring to be amputated, and what has led to the present condition of the man, was that at some time after the date of the original injury he had contracted syphilis, and that his present incapacity and inability to work is attributable to the venereal disease so contracted and not to his original accident. The learned Judge had to consider the precise question to which he had to address himself and which he had to answer, and he stated that question in this way—'The question, it appears to me, I have to ask myself is this. Is Laverick's condition in fact due to the original injury aggravated by infection or disease, or is his condition in fact due to infection and disease quite independent of the original injury, or in other words, is the injury due to *novus actus interveniens?*'"

The cases of *Dunham* and *Laverick* are distinguishable from the present case in respect that in both of those cases the accidental injury sustained in the employment resulted in incapacity on the part of the workman. It appears to me to be one thing to say that in such circumstances the onus of proving a break in the chain of causation is upon the employer who seeks to establish that existing incapacity is entirely due to a new and distinct cause, but a totally different thing to say that a similar onus rests upon the employer where what is proved to have occurred during the employment was not in itself a cause of incapacity.

The case of *Saddington* to which I have already referred may present more difficulty to the view which I have indicated than either *Dunham* or *Laverick*, but there was this important feature in that case, which is absent here, that there was a finding by the arbitrator that the attack by the microbe which caused the septic condition of the hand occurred during the working hours of the workman.

In *Clover, Clayton, & Company* v. *Hughes* ([1910] A.C. 242) Lord Shaw said (at p. 256)—"When one has so to interpret an Act of Parliament as to put an interpretation upon interpretations of it there is much danger of being landed very far away from the meaning of the statute itself." In *Coe* v. *Fife Coal Company* (1909 S.C. 393) Lord Dunedin said (at p. 396)—"I confess frankly that I have found the case to be one of great delicacy and difficulty because it is one of those cases with which one is not unfamiliar in the law, where one seems almost driven by the course of decisions, each of which gradually goes a little farther than the one which preceded it, until at last you reach a point which when the first decision was given was probably not contemplated." If the logical consequence of following the decisions upon which the appellant relies is to necessitate our reversing the conclusion reached by the arbitrator I think you have certainly reached a point which the first of these decisions did not contemplate.

The present case appears to be *a fortiori* of the case of *Bellamy* v. *J. Humphries & Sons* (6 B.W.C.C. 53), where a workman got some dust in his eye while working. He rubbed his eye, thereby causing an abrasion. Subsequently a microbe having no special relation to his employment entered and set up inflammation causing incapacity. It was held that the workman was not entitled to compensation. Cozens-Hardy, M.R., said (at p. 55)—"The germ might have entered the man's eye in his own house or in the street. There was no evidence to show how, when, or where it entered. On these findings, as to which there is no possible mistake, the Judge was bound to decide that this was not proved to be an accident arising out of and in the course of the employment."

A number of cases decided in the House of Lords were cited to us in the course of the argument but none of them, so far as the facts are concerned, bear any clear resemblance to the present case. They illustrate the principle which is now well recognised, that disease contracted in the course of and arising out of the employment constitutes accidental injury within the meaning of the statute. I may refer to one of the most recent of those decisions, *Grant* v. *Kynock*, 1919 S.C. (H.L) 62, [1919] A.C. 765. In that case a workman employed in a manure work died from blood poisoning, the germs producing the disease having entered his system through a scratch or abrasion on his leg. There was no proof when the abrasion was received, nor could it be determined when the infection actually took place. The arbitrator found upon the medical evidence that it was from the bone dust that the infection was contracted, and that death had therefore resulted from the effects of an accident arising out of and in the course of his employment. The House of Lords, reversing the judgment of the Second Division, held that the arbitrator was entitled to reach the conclusion which he did as the fortuitous alighting of the germs upon the abrasion amounted to an accident, and that it was not essential that the actual time and circumstances of the occurrence of this accident should be established. The Lord Chancellor said (at p. 64) —"The invasion of the bacillus is conceived of as a blow or physical assault, and an interval is assumed (perhaps rightly) before the assault, which is the accident, is followed by the infection or contraction of disease, which is the injury." A little later in his speech he adds (at p. 65)—"Where the invading bacillus may be found anywhere—in the train, in the home, in the public house—a prudent arbitrator will require strict proof, such as can hardly in the nature of things be often forthcoming, that the 'accident' in fact arose 'out of and in the course of the employment.' . . . That it should be some particular occurrence happening at some particular time is essential, otherwise it is not in the nature of an accident. What that particular time was is immaterial so long as it reasonably appears that it was in the course of the employment." This reasoning appears to me to be conclusive against the contention of the appellant if you assume that the accident from which he suffered injury was the invasion of the microbes, as I think it was. On the whole matter I think that the question should be answered in the affirmative, though probably the better form of question in a case like the present is not whether the arbitrator was right in holding, but whether he was entitled to hold, that the appellant had not sustained injury by accident within the meaning of the Workmen's Compensation Act.

LORD ANDERSON—The arbitrator refused to award compensation because, as he explains in his note, the appellant did not meet with any accident. I am of opinion that he met with two accidents—(1) the bursting of the blisters, and (2) the intrusion of dirt into the wound and consequent suppuration. The arbitrator would thus seem to have misdirected himself in arriving at his award. Any difficulties which the case presents arise in connection with certain decisions which were referred to, some of which are in apparent conflict with others.

The question raised by the Stated Case, however, must be determined on a consideration of the terms of the statute, and these seem to favour the contention of the appellant. The first section of the Workmen's Compensation Act 1906 provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman" compensation in accordance with the First Schedule of the Act shall be awarded, and that schedule provides by section (1) that a certain rate of compensation shall be paid "where total or partial incapacity for work results from the injury." In the case of *Fenton* ([1903] A.C. 443) it was explained that the words "arising out of and in the course of the employment" in the first section of the Act qualify the compound expression "injury by accident." It would therefore appear that if the appellant met with an "accident" arising out of and in the course of his employment, and that the accident caused injury which resulted in incapacity, the statutory conditions of compensation would be satisfied. And the word "accident" is used in the statute "in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed"—*per* Lord Macnaghten in *Fenton's* case at p. 448. What is found in the present case would seem to satisfy these statutory conditions. The bursting of the blisters was an unlooked-for mishap. Injury was thereby occasioned, and this injury to the hands of a workman using pick and shovel must have had a certain incapacitating effect. This was intensified or aggravated by the ensuing suppuration. The bursting of the blisters occurred while the appellant was at work, and thus arose out of and in the course of the employment. The arbitrator is unable to say when the cause of the suppuration occurred, but it would on the authorities seem to be immaterial when this happened.

As to the decisions, I am of opinion that no decision is antagonistic to the conclusion that compensation is due, while on the other hand there are authorities which directly support that conclusion. Any apparent conflict between decisions disappears if these propositions, which seem to have been affirmed, are kept in view—(1) the onus is on the workman to prove injury by accident arising out of and in the course of the employment; (2) in a case like the present, where the eventual incapacity is due to a combination of two causes, it is enough to prove that one of the causes occurred during the employment and arose out of it; (3) the incapacity will be held to be due to both of the alleged causes and not to the second occurrence alone if there has been no break in the chain of causation—no *novus actus interveniens*. The appellant undertakes the

onus which is thus laid upon him, and in my opinion he has discharged it by establishing the second and third of the foregoing propositions. He has proved that the bursting of the blisters happened in the course of his employment and arose out of it. This bursting necessarily resulted in some injury and consequent incapacity although the appellant continued to work for some days thereafter. The ensuing suppuration is found by the arbitrator to have been caused by dirt having got into the cuticle of the hand where it had been blistered. The incapacity for which compensation is craved was the result. The attack of a microbe or bacillus causing injury is an "accident" in the sense of the Act—*Brintons Limited*, [1905] A.C. 230. It is plain on these findings that had there been no bursting of blisters there would have been no incapacity at all. The bursting is thus a *causa sine qua non* of the ultimate incapacity, which is the result of the bursting plus the suppuration. There is no break in the chain of causation, and the suppuration is not a *novus actus interveniens*, but a cause operating in conjunction with the bursting to produce the joint effect.

There are three cases which at first sight seem hostile to the appellant's contentions —(1) In *Bellamy* (6 B.W.C.C. 53) a weaver got some dust in his eye while at work. A microbe at a time which could not be determined entered the eye which the workman had rubbed and destroyed it. Compensation was refused. The *ratio decidendi* seems to have been that the first occurrence, the dust getting into the eye, was not an accident causing injury, and that the workman had failed to prove that the attack of the microbe—the sole accident—occurred in the course of the employment and arose out of it.

(2) In *Doolan* (11 B.W.C.C. 93) the decision is explained on the same grounds.

(3) In *Grant* (1919 S.C. (H.L.) 62, [1919] A.C. 765) the decision seems to proceed on the footing that the only accident was the attack of the germs which produced blood-poisoning. The scratch on the leg was apparently regarded as having caused no injury, and as thus being causally unconnected with the workman's death, or it may be that it was held to be enough that the workman had proved that one of two combined causes occurred in the course of the employment and arose out of it.

On the other hand there is a large body of authority which supports the contention of the appellant. I content myself with referring to the following cases, the facts of which most closely resemble those of the present case:—*Dunham*, [1902] 2 K.B. 292; *Euman*, 1913 S.C. 246; *Saddington*, 10 B.W.C.C. 624; and *Laverick*, 12 B.W.C.C. 176.

I therefore am of opinion that the question of law (as properly expressed, namely, "Was I entitled to hold") should be answered in the negative.

The Court found that the arbitrator was not entitled on the facts stated to hold that the appellant had not sustained injury by accident within the meaning of the Workmen's Compensation Act.

Counsel for the Pursuer and Appellant—Burnet. Agent—John Baird, Solicitor.

Counsel for Defenders and Respondents—Moncrieff, K.C. — Reid. Agents — Fraser, Stodart, & Ballingall, W.S.

Saturday, June 23.

SECOND DIVISION.

[Lord Murray and a Jury.

LIVINGSTONE *v.* STRACHAN, CRERAR, & JONES.

Evidence—Competency—Hearsay—Attempt to Discredit by Anticipation Evidence which a Witness, if Examined, Might be Expected to Give—Evidence (Scotland) Act 1852 (15 *Vict. cap.* 27), *sec.* 3.

Evidence — Admissibility — Hearsay — Admission by Servant of Defender—Whether Statement by Servant Equivalent to Statement by Party Himself.

Process—Jury Trial—Bill of Exceptions—Undue Admission of Evidence—Failure to Show that Exclusion of Evidence Objected to but Allowed Could not have Led to Different Verdict—Court of Session Act 1850 (13 *and* 14 *Vict. cap.* 36), *sec.* 45.

At a trial by jury of an action of damages for personal injury in which the pursuer averred that he had been run down by a motor van belonging to the defenders and driven by one of their servants, the pursuer adduced a skilled witness who stated that he had examined the *locus* of the accident and had had subsequently a conversation with the driver. On being asked by pursuer's counsel, "What did he (the driver) say to you about the accident?" counsel for the defenders objected to this line of evidence, but the presiding Judge repelled the objection on the ground that a statement by the defenders' representative was *in pari casu* with a statement by the defenders themselves and therefore admissible.

On a bill of exceptions the Court (*diss.* Lord Murray) sustained the objection and ordered a new trial, *holding* (1) that the evidence in question could not be admitted either (*a*) under the provisions of section 3 of the Evidence Act 1852 as proof that a witness had made extrajudicially a different statement from that which he might if examined make in the witness-box, or (*b*) as being *in pari casu* with an admission made by the party himself; and (2) that the pursuer had failed to discharge the onus of showing that the exclusion of the evidence to which objection was taken could not have led to a different verdict.

Opinion (*per* Lord Murray) that section 3 of the Evidence Act 1852 was in the circumstances stated inapplicable, but that the evidence in question was competent as being *in pari casu* with a statement made by the defenders themselves.