Monday, October 30.

(Before Viscount Haldane, Lord Kinnear, Lord Shaw, and Lord Parmoor.)

LOCHGELLY IRON AND COAL COMPANY, LIMITED *v.* KIRK.

(In the Court of Session, January 25, 1916, 53 S.L.R. 270, and 1916 S.C. 397.)

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 2, *sub-sec.* (1)—*Notice of Accident—Prejudice to the Employer in his Defence.*

A miner died on 28th December 1914, as alleged by his widow, from heart failure due to overstrain at his work. Notice of the accident was only given on 6th January 1915. The employers took no steps to have the body exhumed. Against a claim for compensation they maintained that the miner had died from natural causes, and that the claim was not maintainable, inasmuch as notice had not been given as soon as practicable. The Sheriff-Substitute found that the employers had not been prejudiced in their defence by the delay in giving notice. *Held* that the question of prejudice, under section 2 (1) of the Workmen's Compensation Act 1906, was a question of fact for the arbiter, and that there was evidence to support his finding in the case.

This Case is reported *ante ut supra.*

The employers, the Lochgelly Iron and Coal Company, Limited, appealed to the House of Lords.

At the conclusion of the argument for the appellant—

VISCOUNT HALDANE — This is an appeal under the Workmen's Compensation Act from the Second Division of the Court of Session. The question is whether the representative of a deceased workman was entitled to compensation for an accident. The workman died under circumstances which are set out in the finding of the Sheriff-Substitute, who was the arbitrator under the Act, on the 28th December 1914. He was hauling with some fellow-workmen at a steel rope which was attached to a hutch in a narrow part of the pit, and according to the evidence he overstrained himself and then died. He got to the top of the pit before death had supervened, and there he was seen by a doctor, who diagnosed heart failure as the cause of his illness, and his death took place in his cottage a very short time afterwards. Notice was not given under the Act until the 6th January, and meantime the workman had been buried. No proceedings were taken by the appellants, who are a colliery company, for the exhumation of the body, and the question now is whether they have been prejudiced by not having received notice until the 6th January. I will assume, as has been assumed by the Second Division, at anyrate for the purposes of this question, that the notice was not given within the proper time. The Workmen's Compensation Act provides by sub-section (1) of section 2 of the Act of 1906 that "proceedings for recovery of compensation shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof," but there is added a proviso "that the want of notice shall not be a bar to the maintenance of such proceedings if it is found, in the proceedings for settling the claim, that the employer is not prejudiced in his defence by the want of notice, or that the want of notice was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

Now the question came, under the provisions of the statute, before the Sheriff-Substitute as arbitrator, and the Sheriff-Substitute made certain findings of fact. One was that the cause of death was heart failure caused by an accident, the result of the strain, within the meaning of the statute. Another was that although notice had not been given until the 6th January, even if that notice was insufficient, the appellants, the Colliery Company, were not prejudiced thereby; and in his findings of facts he pointed out that no application to exhume was made, and that no point relating to an application to exhume was taken at the time, and indeed it appears that the point was first raised in the defence to the proceedings.

Now it was said that exhumation would have established for certain what the cause of death was—whether it was due to heart failure or whether it was due to cerebral hæmorrhage—and very likely that is true. But it is one thing to say that, and another to say that the cause of death was not sufficiently established before the Sheriff-Substitute. The Sheriff-Substitute found as a fact on evidence which undoubtedly was before him—the evidence of the doctor who saw the man at the pit-head—that he was suffering from heart disease, and consequently that that was the cause of death. The Sheriff-Substitute has also made another and independent finding of fact — that there was sufficient evidence of the cause of death, and that the company were not prejudiced by want of the statutory notice. The company did not elect to take the proceedings they could have taken for exhumation, and there was nothing to disturb the *prima facie* inference from the facts that the cause of death was heart failure. Under those circumstances the Sheriff-Substitute has found the facts and found for the respondent, and the Second Division have affirmed the decision. I am of opinion that the Second Division were right in affirming the finding of the Sheriff-Substitute.

It is not our practice in this House to look upon appeals brought under this Act with much favour. It was obviously the intention of the Legislature that the Sheriff-Substitute should dispose of the case in that summary fashion which is appropriate to proceedings of this kind. But everybody has his right, if the statute has not been complied with, to bring before the Courts, and before the ultimate tribunal if necessary, the fact that there has been a want of

compliance with the provisions of the Act. But that is limited, as has been laid down often in this House, by the consideration that in order to succeed in setting aside the finding of the Sheriff-Substitute or the arbitrator, whoever the arbitrator may be, he has got to show either that there was no evidence at all on which the arbitrator could reasonably proceed, or that on the face of his award there is a mistake in law apparent.

It is plain to me that in this case there was evidence upon which the Sheriff-Substitute could find as he did on the point that the appellants were not prejudiced by absence of notice, and under these circumstances I move your Lordships that the appeal be dismissed with costs.

LORD KINNEAR — I entirely agree with my noble and learned friend. As I understand, there is no question now in controversy except whether the appellants have or have not been prejudiced by the failure of the respondent to give notice of the accident.

Now that is a pure question of fact which has been decided by the learned Sheriff-Substitute as arbitrator. The form in which it arose was that it was maintained, on the one hand, that the death was due to cerebral hæmorrhage, and on the other hand that it was due to heart failure caused by excessive strain in the course of the man's work in the mine. The Sheriff-Substitute had evidence before him on which he came to the conclusion that it was due to heart failure, and I suppose that if that were the only question nobody would dispute that that was really a question of fact for him, and that he had come to a conclusion which, whether right or wrong, was at all events maintainable on the evidence.

But then it is said that, such as it was, the evidence was not absolutely conclusive, and that it might have been made so were it not for the failure of the applicant to give due notice, in consequence of which the appellants were unable to prove what they claim they might have proved as to the cause of death had they known of the accident in time; but that again is a question of fact for the Sheriff-Substitute. The learned Sheriff-Substitute has considered that, and he has come to the conclusion that the appellants have not suffered prejudice from the cause alleged, because all the advantages which would in their view have been open to them if they had obtained due notice in time were still obtainable if they had chosen to use the ordinary means of ascertaining the facts. His view therefore is that no prejudice has been proved. Now he may be right or wrong in that; I do not know. I think there is a great deal of force in some of the observations which were made by Mr Horne, but it was a question for the learned arbitrator and for nobody else, and I think it is quite impossible to say that no reasonable man with the facts before him which were before the mind of the learned Sheriff-Substitute could have reached the conclusion at which he has arrived, and if we cannot say so, then we cannot disturb his judgment.

LORD SHAW—In many such cases the fact of the accident having taken place being plain, the causal connection between the accident and the death may of course require to be cleared up, and it is easily conceivable that the obscurity may be removed by a post-mortem examination. These cases are conceivable, and in each of them the statute lays upon the judge the duty of determining as a matter of fact whether the delay in giving notice has been to the prejudice of the employer. The learned Sheriff-Substitute in the present case has most properly addressed himself to that issue of fact, and he has found substantively in the language of the statute that no such prejudice has occurred. I see nothing whatsoever in the case to induce me to infer that that judgment was arrived at without sufficient cause, and *a fortiori* I see nothing which should induce me to state affirmatively that there was no reasonable ground for his coming to that conclusion. Upon evidence perfectly reasonably given upon both sides he has made the negative conclusion required by the statute, and I do not think it is for this House to interfere with that. Upon the facts I would only further observe that no attempt was made by the appellants to assist in clearing up the facts by making any application either with or without the consent of the relatives for the exhumation of the body of the interred workman. The appellants chose rather to allow the obscurity to remain, and to found upon a prejudice which they left the Court to infer that they had suffered. In those circumstances the arbitrator is not to be blamed for making his adjudication to the best of his power upon all the materials before him. In that I think he was right, and his judgment does not seem to be impaired by any error in law.

LORD PARMOOR—The question whether an employer is not prejudiced in his defence by delay in the giving of notice is simply a question of fact. The finding of the arbitrator cannot be set aside unless there is no evidence, or the circumstances are such that no reasonable man could come to the conclusion to which he has come. Lord Loreburn points out in the case of *Hayward* that the arbitrator in coming to a decision should look at all the matters before him without a presumption one way or the other. I think this House could not under the conditions in this case interfere with the finding of the learned arbitrator, which was confirmed by the Court of Session.

Their Lordships dismissed the appeal with expenses.

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