whether the workman has recovered, or, on the contrary, has become still further disabled.

From the point, therefore, when the medical referee, where there is an appeal to him, has pronounced on the one point on which he is final, viz., that there was disablement from an industrial disease—for the question whether there has been recovery since the certifying surgeon's certificate is not within the purview of the remit to him under section 8 (1) (*f*)—everything proceeds as usual under the first schedule. For instance, there may be under section 15 of that schedule a reference of a different character to the same or another medical referee as to the workman's condition, where the medical referee's certificate as to the condition of the workman and his fitness for employment would be conclusive evidence as to the matter so certified.

But that reference would not be a special reference under section 8 of the statute, providing compensation for industrial disease, but a reference of the general nature applicable to all claims of compensation.

I think that the medical referee and the Sheriff have neglected to observe this distinction. To the form of the certificate of Dr Harrison, the certifying surgeon, there is, I think, no objection. But Dr Scott, the medical referee, in dismissing the employers' appeal against Dr Harrison's certificate of disablement, which would have been quite in order if he had gone no further, added a rider in these words—"With this restriction, that the said John Garrett is now able to resume his ordinary work." In so doing I think the medical referee was going beyond his functions under the 8th section of the Act, and was proceeding as if he were acting at the same time under the 15th section of the schedule, which he was not. From the date of Dr Scott's decision, 13th December 1910, the employers withheld any further compensation, and the workman returned to work as a miner, but on 24th January 1911 the workman instituted the present proceedings for an award of partial compensation on the ground that he had not yet fully recovered his earning capacity, and the Sheriff, in respect of the above rider to the medical referee's decision, on the matter appealed to him held that the workman was precluded from claiming compensation after the date of the medical referee's decision. It is in this that I think he was wrong, for the medical referee was not entitled, on the remit made to him, to pronounce on anything except the remitted question. In an arbitration ensuing on the workman's demand it is possible that a remit to him, or to some other medical referee, on the subject of the workman's present condition may have to be made. But that would be a remit under section 15 of the first schedule, and not an application for review under the 8th section of the Act. Notwithstanding, therefore, the opinion expressed by the medical referee, the question of the workman's continued disablement and the extent of his incapacitation for his work must still, I think, be determined under such form as would be applicable if this were a case of accident and not of industrial disease.

LORD SKERRINGTON—I concur.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court pronounced this interlocutor—

"... Answer the question of law in the case in the negative: Sustain the appeal: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to proceed. ..."

Counsel for the Appellant—Constable, K.C.—A. Moncrieff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

Thursday, July 13.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WINTERS *v.* ROBERT ADDIE & SONS COLLIERIES, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) (*f*)—*Medical Referee—Scope of Reference—Contradictory Decision.*

A certifying surgeon granted a certificate that a miner was suffering from a certain industrial disease to which the Workmen's Compensation Act 1906 applied, and was thereby disabled from earning full wages at the work at which he had been employed. The employers being aggrieved had the matter referred to a medical referee pursuant to section 8 (1) (*f*) of the Act. He issued a decision or deliverance whereby, subject to a note appended, he dismissed the appeal. The note was contradictory of the deliverance.

The Court, holding that the Sheriff as arbitrator should have refused to accept the deliverance, *remitted* the cause to him to remit of new to the medical referee to complete the reference by answering categorically whether the workman was suffering from an industrial disease, and whether he was thereby disabled from earning full wages.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), section 8, is quoted in the immediately preceding case of *Garrett* v. *Waddell & Son.* By order of the Secretary of State, dated 22nd May 1907, the provisions of section 8 were extended, *inter alia*, to nystagmus.

Peter Winters, miner, Uddingston, claimed compensation under the Workmen's Compensation Act 1906 from Robert Addie & Sons Collieries, Limited, Uddingston, and being dissatisfied with a determination of the Sheriff-Substitute at Hamilton (A. S. D. Thomson), acting

as arbitrator under the Act, appealed by Stated Case.

The Case stated—"This is an arbitration in which the appellant claimed an award of compensation under the said Act in respect, he alleged, that he had been a miner in the respondent's employment for a considerable period prior to 25th July 1910, and was from 9th September 1910 totally incapacitated for work as a result of an affection of the eyes known as miner's nystagmus, and was certified on 4th October 1910 to be suffering from and to be disabled by said disease, which disease is one of the scheduled diseases under said Act.

"The case came before me, the appellant producing and founding upon (1) A certificate of disablement granted by Doctor John Goff, Bothwell, one of the certifying surgeons under the said Act, and (2) A certificate granted by Dr Freeland Fergus, Glasgow, a medical referee under said Act, to whom the respondents had appealed against the said certificate of the certifying surgeon.

"The said certificate of the certifying surgeon is herewith produced. It bears that the surgeon having personally examined the appellant on 4th October 1910, certifies that he was suffering from nystagmus; that he was thereby disabled from earning full wages at the work at which he had been employed, and that the disablement commenced on 25th July 1910. It also bears that the leading symptom of the disease is 'inability to see in artificial light.' The said certificate by the medical referee, dated 4th November 1910, is herewith produced, and bears that the referee decided as follows—'Subject to the note which I have sent with this to the Sheriff-Clerk-Depute, I dismiss the appeal of Messrs Addie against the certificate of disablement given to Peter Winters on the 4th day of October 1910.'

"The 'note' referred to is also herewith produced, and is as follows—'This case presents features of special importance, and questions arise which seem to me as not admitting of a categorical answer.

"'Winters unquestionably has nystagmus, and I believe it to be miners' nystagmus. It is, however, of a very mild type, and taking the nystagmus *per se*, I would certify Peter Winters as being able to work above ground. In severe cases I would prefer a man to refrain from all work for some time. The difficulty of vision does not depend largely or even materially on the nystagmus, but on the fact that there is disease, and that not connected with his work, in the choroid of each eye, which is worse in the right. When on the 25th of July the works' manager objected to Winters going below on account of his defective vision, I have no doubt that the defective vision was not due to the nystagmus but to the night blindness which invariably accompanies this form of disease. I have no information that would lead me to suppose that miners' nystagmus was present on the 25th of July. The man himself wished to go down the pit on that date. In view of a certificate granted by Dr John Goff, I am of opinion that he had it on the ninth day of September 1910.'

"The respondents lodged a note of defence to the appellant's claim for an award, in which they plead, 'The claim of the pursuer is resisted on the ground that the slight nystagmus from which he suffers is not the cause of his incapacity for work, but that same is due to disease unconnected with his employment with the defenders. Reference is made to the report of the medical referee, and to the note attached thereto, in which the referee says . . .' and they proceed to quote a portion of the note by the medical referee above set forth at length.

"The parties were heard upon the whole case, and after consideration I pronounced an interlocutor on 21st February 1911, having a note appended in which I set forth the grounds of judgment. By the interlocutor I found, in terms of the report of the medical referee, Doctor Freeland Fergus, that the defender suffers from miners' nystagmus, which began on 9th September 1910, but that it is of a very mild type, and is not the cause of, nor does it materially contribute to, his incapacity for work, which incapacity is due to disease unconnected with his employment, and I therefore dismissed the petition and found the appellant liable in expenses.

"These findings were based upon the view that the report and note of the medical referee must be read as one document, and that a fair construction of the document warranted these findings and the judgment which followed upon them. I refused the appellant's motion for a proof, but offered to send the report and note back to the medical referee that he might either amend it or answer specific questions to be adjusted by parties for his consideration. The offer, however, was declined."

"The *questions of law* for the opinion of the Court are—(1) Was the arbiter entitled to read the note along with the report of the medical referee? (2) Did the decision of the medical referee warrant the findings and judgment of the arbiter? (3) Was the medical referee, when dismissing the appeal against the certificate of disablement, entitled to determine the date of disablement and to alter the date of disablement certified by the certifying surgeon?

Argued for the appellant—The duties of a certifying surgeon or medical referee were confined to the matters referred to them in section 8 of the Act, and if anything further were added by either as a note, that was irrelevant, and could not be referred to for the purpose of negativing or qualifying the actual decision. Here the decision put the miner in the same position as if there had been an accident. It was not within the scope of the referee's remit to find that the workman had recovered.

Argued for the respondent—There were three conditions or requisites in section 8 of the Act, which the certifying surgeon or medical referee had to hold as

satisfied in order to put the workman in a position equivalent to where an accident had occurred, namely, (1) that the workman was suffering from a scheduled industrial disease, (2) that he was thereby disabled, (3) that the disease was due to the nature of the employment. Here the referee had negatived the second. His decision was final.

At advising—

LORD PRESIDENT — In this case the appellant Winters obtained from a certifying surgeon a certificate that he was suffering from miners' nystagmus; that on 4th October 1910 he was suffering from nystagmus; and that he was thereby disabled from earning full wages at the work at which he had been employed. An appeal was taken against the granting of that certificate by the employers, Messrs Addie & Sons, and the medical referee to whom it had been referred issued the following deliverance or judgment—"Subject to the note which I have sent with this to the Sheriff-Clerk-Depute, I dismiss the appeal of Messrs Addie against the certificate of disablement given to Peter Winters on the 4th day of October 1910;" and the note appended is as follows—"This case presents features of special importance, and questions arise which seem to me as not admitting of a categorical answer. Winters unquestionably has nystagmus, and I believe it to be miners' nystagmus. It is, however, of a very mild type, and taking the nystagmus *per se* I would certify Peter Winters as being able to work above ground." Then he goes on—"In severe cases I would prefer a man to refrain from all work for some time. The difficulty of vision does not depend largely or even materially on the nystagmus, but on the fact that there is disease, and that not connected with his work, in the choroid of each eye, which is worse in the right. When on the 25th of July the works' manager objected to Winters going below on account of his defective vision, I have no doubt that the defective vision was not due to the nystagmus, but to the night blindness which invariably accompanies this form of disease." "This form of disease" obviously meant disease of the choroid of the eye. Now the note being in that position, the learned Sheriff-Substitute by an interlocutor found "that the appellant suffers from miners' nystagmus, which began on 9th September 1910, but that it is of a very mild type, and is not the cause of, nor does it materially contribute to, his incapacity for work, which incapacity is due to disease unconnected with his employment, and I therefore dismissed the petition;" and the question put to us is whether he was right in that procedure.

I do not repeat what I have said before in the last case—*Garrett* v. *Waddell & Son*, *supra*, p 937, but, I proceed at once to apply those views, which of course were the views of the Court. It was the business of the medical referee to apply his mind, yea or nay, to the question whether this certificate was properly granted or not. He dismissed the appeal, and if that deliverance had stood alone that would have been quite satisfactory; but then he goes on to append a note which, it appears to me, is very clearly to the opposite effect. The Sheriff-Substitute has clearly read the note as practically putting a stroke of the pen through the dismissal of the appeal.

I do not think the Sheriff-Substitute can do that; but, on the other hand, neither do I think that when a medical referee signs a deliverance which he says is subject to a note appended you can read one part of his deliverance without reading the whole of it; and upon the whole matter I think the case must be sent back in order that the Sheriff-Substitute may get a yea or nay out of the medical referee. It is to my mind in the same position as when a jury proffers to a judge a verdict which is contradictory. It has been held again and again that a judge ought not to take such a verdict. After all I cannot understand what the medical referee means when he says that the question does not admit of a categorical answer. The question must admit of a categorical answer,—first, Was the man suffering from an industrial disease? and second, Was he owing to that industrial disease on that day disabled from earning full wages at his former employment? As I have already pointed out in the former case, questions as to what his present condition is will arise upon the proceedings for compensation, but there must be a possibility of giving a categorical answer to the question, Was the certificate rightly granted or not?

Accordingly I am of opinion that the case must be sent back. I do not think the question of law ought to be answered at all, but I think that the case should be sent back in order that a proper finding may be obtained from the medical referee.

LORD JOHNSTON—I refer to the case of *Garrett* v. *Waddell & Son*, just decided. There the medical referee added an incompetent rider to his decision dealing with matter not, at the stage of the case with which he was concerned, referred to him. Here the medical referee appears, in another direction, to have mistaken his function, which was simply to say whether the certifying surgeon was right or wrong in finding that the workman was suffering from a scheduled industrial disease, and was thereby disabled from earning full wages at his employment.

Now the medical referee has found that the surgeon was right. But that "subject to" a note to his decision, which cannot be otherwise read than as meaning that the certifying surgeon was in part right and in part wrong—right in finding that the workman was suffering from a scheduled industrial disease, and wrong in holding that he was thereby disabled.

Though liable to be mistaken in the true meaning of such a balanced statement, I should have agreed in the interpretation which the Sheriff has put upon the medical referee's pronouncement, if I felt myself

justified in putting an interpretation upon it at all. But that I do not think that I am. A medical referee is bound to have convictions and to have the courage of his convictions. I think, therefore, that whether the parties agreed or not, the Sheriff should have declined to accept the medical referee's report, and have returned the case to him with instructions to give a distinct expression of opinion on the point referred to him; and that I think should still be done.

LORD SKERRINGTON concurred.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court pronounced this interlocutor—

"*Hoc statu* recal the determination of the Sheriff-Substitute as arbitrator, dated 21st February 1911, and remit the cause to him to remit of new to the medical referee to complete the reference already made to him: Find no expenses due to or by either party."

Counsel for the Appellant—Constable, K.C. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Horne, K.C.—Strain. Agents—W & J. Burness, W.S.

Thursday, July 13.

FIRST DIVISION.

THE SHANDON HYDROPATHIC COMPANY, LIMITED, PETITIONERS.

Company — Capital — Arrangement with Debenture-Holders — Power to Sanction Arrangement Changing Terminable Debentures into Perpetual Debenture Stock — Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 120.

The power given to the Court by the Companies (Consolidation) Act 1908, section 120, to sanction a compromise or arrangement between a company and its creditors, or between the company and its members, gives them jurisdiction to sanction an arrangement whereby terminable debentures or debenture bonds are converted into perpetual debenture stock.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 120, enacts—"(1) Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the Court may, on the application in a summary way of the company, or of any creditor or member of the company, or in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members as the class may be, to be summoned in such manner as the Court directs. (2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company. (3) In this section the expression 'company' means any company liable to be wound up under this Act."

The Shandon Hydropathic Company, Limited, incorporated under the Companies Acts, and having its registered office at No. 188 St Vincent Street, Glasgow, presented a petition for authority to call and hold a meeting of debenture-holders, and for sanction of an arrangement.

The petition set forth, *inter alia*—"The objects for which the company was established are set forth in head 3 of the memorandum of association of the company, and were—'The purchasing of the estate known as "West Shandon," situated in the parish of Row and county of Dumbarton. The erecting, fitting up, furnishing, and maintaining thereon all necessary or convenient buildings for a hydropathic establishment, including baths and offices. The carrying on of a hydropathic establishment therein, including hiring, and all other business incident thereto. The erecting of a pier *ex adverso* of the said property. The acquiring of all other property, real or personal, necessary for carrying out all or any of the foresaid objects. The holding, managing, improving, building upon, dealing with, feuing, selling, or disposing of the company's property, or any parts or portions thereof, and the doing all such other things as are incidental or conducive to the attainment of the above objects, including especially the borrowing of money on security of the property purchased or to be purchased, or acquired, or on debenture, and the repaying or liquidating of the same.'

"Head 5 of the memorandum of association of the company makes the following provision as to the capital of the company—'The capital of the company is £35,000, divided into 7000 shares of £5 each.'

"By article 1 of the articles of association of the company the regulations contained in the table marked A in the first schedule to the Companies Act 1862 were, subject to certain alterations and modifications, adopted as the regulations of the company. . . .

"By special resolution passed 19th July and confirmed 6th August 1878, the capital of the company was increased by adding thereto £35,000, divided into 7000 shares of £5 each, thus making the total amount of the capital of the company £70,000, divided into 14,000 shares of £5 each.

"Of the 14,000 shares of £5 each forming the whole share capital of the company, 9290 shares have been issued. They are all fully paid.