Counsel for the First, Third, and Fourth Parties—Moncrieff, K.C.—Black. Agents—Bell, Bannerman, & Finlay, W.S.

Counsel for the Second Parties—Howden. Agents—Bell, Bannerman, & Finlay, W.S.

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Friday, October 24.

FIRST DIVISION.

[Sheriff Court at Hamilton.

SCULLION *v.* CADZOW COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8, *sub-sec.* (2), *and Third Schedule—Industrial Disease—Process of Mining—Surface Worker at Pit-head.*

A workman was engaged as a surface labourer at a colliery pit-head on 8th and 9th January 1913, and on the latter day was attacked by pain in the head and dizziness. He subsequently obtained from the certifying surgeon a certificate that he was suffering from nystagmus, that in consequence he was disabled from earning full wages, and that the date of his disablement was 9th January 1913.

Held that he was not employed in any process of mining within the meaning of section 8, sub-section (2), and the Third Schedule of the Workmen's Compensation Act 1906, and consequently was not entitled to the statutory presumption thereof, viz., that the disease was due to the nature of the employment.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8—"(1) Where (i) the certifying surgeon appointed under the Factory and Workshop Act 1901, for the district in which a workman is employed, certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act, and is thereby disabled from earning full wages at the work at which he was employed, . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement, he or his dependants shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications: — . . . (2) If the workman at or immediately before the date of the disablement . . . was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment unless the employer proves the contrary."

By Order in Council, dated 22nd May 1907, the lists of processes and diseases contained in the Third Schedule to the Act was extended to include, *inter alia*:—

Description of Disease or Injury.	Description of Process.
Nystagmus.	Mining.

Denis Scullion, miner, 4 M'Creath Street, Cadzow, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 from his employers, the Udston Coal Company, Limited, Hamilton, *respondents*, on the ground that he was suffering from nystagmus, being one of the scheduled diseases to which the Act applied.

Being dissatisfied with the determination of the Sheriff-Substitute (HAY SHENNAN), acting as arbiter under the Act, Scullion appealed by Stated Case.

The Case stated, *inter alia*—"The appellant founds his claim on the certificate of disablement after mentioned, and claims compensation on the ground that at or immediately before the date of his disablement he was in the respondents' employment in their Cadzow Colliery, Hamilton.

"Proof was led before me on 17th March and 21st April 1913, when the following *facts* were admitted or proved:—1. The appellant worked as a miner in the respondents' employment at Cadzow Colliery, Hamilton, from October 1911 to 1st May 1912, when his right eye was injured by a spark from a pick and he became totally incapacitated for work. The respondents paid the appellant compensation down to 4th January 1913, when payment was stopped on the ground that the appellant was then fit to resume work. No claim is made in the present arbitration in respect of this accident. 2. On payment of compensation being stopped the appellant obtained work as a surface labourer at the respondents' pit-head and wrought there on 7th and 8th January 1913, but he had to give up work on account of pain in his forehead and dizziness. 3. On 23rd January 1913 the appellant obtained a certificate from the certifying surgeon that he was suffering from nystagmus and was thereby disabled from earning full wages, and that the disablement commenced on 9th January 1913. The respondents appealed to one of the medical referees under the Act, but their appeal was dismissed on 8th February 1913. 4. During the twelve months previous to the date of the appellant's disablement (9th January 1913) he worked with the respondents as a miner below ground from 9th January 1912 to 1st May 1912, and as a surface labourer on 8th and 9th January 1913. During the period intervening between those periods of employment he was off work owing to the accident of 1st May 1912. 5. It is not proved that the appellant suffered from nystagmus either between 9th January 1912 and 1st May 1912 or at any previous period. 6. The Cadzow pit in which the appellant was employed is a safety-lamp pit. 7. The

appellant has not proved that the nystagmus from which he suffers was due to the nature of his employment during the twelve months previous to the date of his disablement. 8. The respondents have not proved that the appellant's nystagmus was not due to the nature of his employment during the twelve months preceding the date of his disablement. 9. Nystagmus is a disease of insidious growth. A man with incipient nystagmus may work for long underground without being aware that he is suffering from it. Miner's nystagmus is caused by working in bad illumination. It occurs almost invariably in miners who work in safety-lamp pits, being frequently called the "Glennie blink" from the name of a safety lamp in common use. Nystagmus is not in fact associated with or found to be caused by surface labouring work. Section 8, sub-section 2, of the Workmen's Compensation Act 1906 provides—'If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment unless the employer proves the contrary.' The certifying surgeon in the present case did not certify that the disease was not due to the nature of the appellant's employment.

"On the above facts I held that the question of liability depended on the *onus* of proof; that the appellant was not at or immediately before the date of disablement employed in mining in the sense in which mining is used to denote the process to which nystagmus is related; and that therefore the *onus* lay on him to prove that his nystagmus was due to the nature of his employment with the respondents between 9th January 1912 and 9th January 1913. As he had failed to discharge this *onus*, I refused his claim for compensation. If I had held that the *onus* lay on the respondents to prove that the appellant's nystagmus was not due to such employment, I should have awarded the appellant compensation of 7s. per week in respect of partial incapacity.

"I held that 'mining' as related to nystagmus means miner's work underground, and does not include all work on, in, or about a mine, and in particular does not include the surface labouring work at which the appellant was employed on 8th and 9th January 1913. Accordingly, in my opinion, the appellant had not the advantage of the presumption established by section 8, sub-section (2), of the Workmen's Compensation Act 1906."

The *questions of law* for the opinion of the Court were—"1. On the facts above stated was the *onus* on the appellant to prove that the nystagmus from which he suffered was due to the nature of his employment with the respondents? or 2. Was the *onus* on the respondents to prove that the appellant's nystagmus was not due to the nature of his employment with them? 3. Ought the Sheriff-Substitute to have awarded compensation to the appellant?"

Argued for the appellant—(1) The *onus* was not on the appellant to prove that the nystagmus was due to the nature of his employment. That must be presumed in his favour in virtue of section 8, sub-section (2), of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). The appellant immediately before disablement was employed in a process, namely, mining, added by an Order of the Secretary of State, dated 22nd May 1907, to the second column of the Third Schedule, and the disease contracted by the appellant, namely, nystagmus, was a disease which under the provisions of that Order was set opposite that process. The process of mining had a similar meaning to "mine" as defined in the Coal Mines Act 1911 (1 and 2 Geo. V, cap. 50), sec. 122, and included any "process ancillary to the getting, dressing, or preparation for sale of minerals." To hold otherwise would entail several definitions of mining for other diseases of mining, for ankylostomiasis and beat-hand were not necessarily confined to underground workings—Lawes' Compensation for Industrial Diseases, pp. 257, 278, 283. Mining was not confined to underground working—*Magistrates of Glasgow* v. *Farie*, August 10, 1888, 15 R. (H.L.) 94, Lord Watson at p. 101, 26 S.L.R. 229. (2) Assuming that the *onus* was on the appellant to show that the nystagmus was due to the employment, he had discharged that *onus*, and there was no evidence on which the arbitrator was entitled to come to a contrary conclusion. This was a question of law—*Vaughan* v. *Nicoll*, February 6, 1906, 8 F. 464, Lord Dunedin at p. 466, 43 S.L.R. 351. Reference was made also to *M'Ginn* v. *Udston Coal Company, Limited*, 1912 S.C. 668, 49 S.L.R. 531.

Argued for the respondents—The appellant being a surface labourer was not entitled to the benefit of the presumption established by section 8, sub-section (2). The object of that section was to make special provision for workmen who were subject to special risks of taking certain diseases owing to the nature of their employment. Here no special risk was incurred. (Reference was made to Luson & Hyde's Diseases of Workmen, p. 91.) All those engaged in winning the coal or other mineral and bringing it to the surface were engaged in the process of mining, but not all those who were engaged on, in, or about a mine. (2) It was absurd to say that every reasonable man must have come to the conclusion that the nystagmus was the result of the appellant's previous underground working. Mining was not the sole cause of nystagmus.

At advising—

LORD PRESIDENT [STRATHCLYDE]—We are asked here to consider and decide whether a man at work on the surface of the ground above a coal mine was engaged in the process of mining. I am

of opinion that he was not. The circumstances under which the question arises were as follows:—On the 8th and 9th January 1913 the appellant was engaged at the pit-head of Cadzow Colliery, near Hamilton, as a surface labourer. On 9th January 1913 he was attacked by a severe pain in the head and dizziness and was compelled to cease work. Subsequently in the month of January he obtained from the certifying surgeon a certificate to the effect (first) that he was suffering from nystagmus, (second) that in consequence he was disabled from earning full wages, and (third) that the date of the commencement of his disablement was 9th January 1913. An attempt to challenge the surgeon's certificate was unsuccessful, and accordingly this appellant, armed with a certificate in the terms which I have mentioned, was in a position to say, subject to certain conditions, that the disease which he had contracted must be deemed to have been due to the nature of the employment in which he was engaged, provided that employment was the process of mining, for the 8th section and second sub-section of the Statute of 1906 provides—". . . [*quotes, v. sup.*] . . ."

Now at the date of the disablement this man was, as I have said, engaged at work on the surface of the mine, and was not engaged, in my opinion, in the process of mining. It is acknowledged that there is no statutory definition of the "process of mining"—that the expression is not used in any technical or artificial or secondary sense, but is to be construed according to the plain ordinary signification of the words. What, then, is, in plain ordinary language, the meaning of the expression "the process of mining"? I think there can be no doubt the meaning of that expression is the obtaining of mineral from an excavation in the earth which necessarily implies two things—(first) the actual cutting or hewing of the mineral, and (second) its removal to the surface. In no part of that operation was the appellant engaged. Indeed, it was stated in argument that in order to entitle him to succeed in his appeal it would be necessary for him to show that "the process of mining" was equivalent to and interchangeable with the expression "employment on, or in, or about a mine." Now the latter expression is familiar in this chapter of law. It is to be found in the 7th section and 1st subsection of the Workmen's Compensation Act of 1897, and has been frequently the subject of judicial construction. And I cannot doubt that if the Legislature had intended that the expression "the process of mining" should be equivalent to the expression "employment on, in, or about a mine," the latter expression would have been used, being, as I have said, perfectly familiar in this branch and chapter of law. That it was not so used is clearly decisive, in my mind, of the meaning of the Legislature, and demonstrates that it was intended, in using the expression "the process of mining," to signify something entirely different.

That is exactly what one would naturally have expected, because it would be strange indeed if a statutory presumption were to be set up that a man who had contracted a certain disease should be deemed to have contracted it because of the nature of the employment in which he was engaged at the time if that disease was one which was neither necessarily nor naturally connected with the particular work in which the man was engaged.

Such is the case before us here, because the arbiter has found, as a matter of fact, that "nystagmus is not in fact associated with or found to be caused by surface labouring work"; and if that is so, then inasmuch as this man was not engaged in the "process of mining" at the date of his disablement, I am of opinion, agreeing with the arbiter, that he is not entitled to have the advantage of the presumption.

Another topic was raised but was only faintly argued to us. It appears that for a period of a little over eight months prior to the date of his disablement the appellant was not engaged in any work at all.

He was suffering from the effects of an accident which befel him on 1st May 1912. But for some time prior to that date he had been engaged as an ordinary miner working underground at the same colliery, all within a period of twelvemonths prior to the date of his disablement; and it is contended that if he be not entitled to the benefit of the statutory presumption, nevertheless he may show by evidence that *de facto* the disease which he contracted on 9th January 1913 was due to the nature of the employment in which he had been engaged prior to the date of his accident on 1st May 1912.

That is no doubt so, but the appellant, having the opportunity, attempted to show that his disease was due to the nature of the prior employment, and, in the opinion of the arbiter, failed. That is a pure question of fact upon which the arbiter is final judge. It was no doubt argued to us that if there were no facts upon which the arbiter could come to the conclusion he has reached, it would be within our power to disturb his finding. That may be so, but I am very clearly of opinion that the arbiter here had evidence before him upon which he was entitled to form the conclusion he did. And even if I thought—which I certainly do not—that he had come to a wrong conclusion, I am clearly of opinion that we cannot disturb it.

I propose to your Lordships therefore that we should answer the first question put to us in the affirmative, the second question in the negative, and the third question in the negative.

LORD JOHNSTON — The claimant has obtained a certificate that he was at 9th January 1913 suffering from an industrial disease, viz., nystagmus. He has therefore cleared his way to a claim as if he had met with a physical accident. But before he can make good his right to compensation he must establish that the disease is due to the nature of the employment in which he

was engaged within the twelve months previous to the said date. In proceeding to establish that fact, he has, under section 8 (2) of the Act of 1906, the benefit of a presumption that the disease "shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." But the benefit of the presumption depends upon the condition that the workman was, at or immediately before the date fixed by the certificate, employed in the industrial process to which in the schedule the disease is appropriated. That industrial process is, in the case of the disease nystagmus, the process of mining.

Now the claimant was unquestionably engaged in the work of mining from October 1911 to 1st May 1912. But that period of employment ceased more than seven months before the certified date, and cannot be regarded as having been at or immediately before the certified date. Again, he was engaged at the pit-head for two days immediately previous to the certified date, in surface work, viz., as we are informed, hauling hutches to the scree. I do not think that it would be safe in this case to determine precisely and exhaustively what is included in the term "mining" as used in the statutory schedule. That it involves underground work I think it is sufficiently clear. But whether it is limited to the work of getting the coal, and does not also include the drawing and other incidental work which is involved in bringing the coal got to the surface may be a question. It is enough for this case that it does not include the class of surface labour at which the claimant was employed for two days prior to the certified date. The claimant has not therefore the benefit of the presumption of section 8 (2). The *onus* of establishing that the disease from which he suffers was due to the nature of his employment in the service of the respondents during the earlier part of the twelve months preceding the certified date lies with him, and he has not, in the opinion of the Sheriff on the facts, discharged that *onus*. The Sheriff has therefore come to the only logical conclusion, and I therefore agree with your Lordship in answering the question in the manner your Lordship proposes.

At first sight the case is one of hardship. But it must be remembered that the inclusion of industrial disease as an equivalent of physical accident by the Act of 1906 is accompanied by a provision which may often bear with great hardship on the employer, in respect that though an industrial disease may have its origin in previous years and be of insidious growth, once it is developed to the point of certification the whole responsibility for compensation is cast upon the shoulders of the employer or employers of the last twelve months. Such employer or employers are justified in requiring that the *onus* of proof be clearly discharged by the claimant.

LORD MACKENZIE—I am of the same opinion. In order to have the benefit of the presumption established by the statute, the nystagmus from which the workman was suffering must have been contracted in the process of mining, and he must have been engaged in the process of mining at or immediately before the date of disablement caused by the nystagmus. Therefore the question in the case is, in what sense is the term "mining" used in the schedule to the Act. In my opinion "mining" so used is to be construed in its ordinary acceptation. It is impossible to say that a man engaged as a surface labourer can be described as engaged in the process of mining.

That view is confirmed when one considers the description of the diseases which are described in the original schedule to the Act and those contained in the order which extends the schedule. These diseases, in so far as they apply to miners, are those which affect members of the organisation underground, and are not such as affect those who are employed on the surface. In the present case we have a distinct finding by the arbiter that "nystagmus is not in fact associated with, or found to be caused by, surface labouring work."

It follows that the workman in question can take no benefit from the presumption established by statute, and unless he has proved that the disease is due to the nature of his employment, he cannot succeed. That of course is a pure question of fact, and one for the arbiter to decide, and we cannot, according to all the principles laid down in previous cases, interfere with what the arbiter has done unless we find there is no evidence upon which his conclusion can be based. I am unable to take that view upon the facts as stated in the present appeal, and, accordingly, I am of opinion that the conclusion reached by the learned Sheriff-Substitute is correct.

LORD SKERRINGTON had not yet taken his seat in the Division.

The Court answered the first question of law in the affirmative, and the second and third questions in the negative.

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

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

Friday, October 31.

SECOND DIVISION.

SCOTT *v.* SCOTT.

Process—Parent and Child—Custody—Petition by Mother to Recover Custody of Pupil Child—Remit to Sheriff-Substitute to Inquire into Facts—Scope of Remit and Form of Interlocutor.

A widow petitioned the Court to obtain the custody of her pupil son. Answers were lodged by a stranger in whose custody the child was. When the case was called