Scott and Others v. *Portsoy Harbour Trustees*, (1900) 8 S.L.T. 38, *approved*.

Andrew Finlay, engineman, 156 Dumbarton Road, Partick, Glasgow, as tutor and administrator-in-law of his pupil child Louise Margaret Finlay, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for damages in respect of injuries sustained by the child through being struck and knocked down by a tramway car belonging to the defenders.

In Single Bills in the First Division the pursuer moved for a diligence for the recovery of certain documents, including, after amendment at the bar, those specified (*supra*) in the rubric.

Counsel for the pursuer argued that any document which helped to elucidate what was passing in the mind of the tramway driver or the general circumstances of the accident could be referred to, and quoted the following cases:—*Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Limited*, 1909 S.C. 335, Lord M'Laren at 341, Lord Kinnear at 342, 46 S.L.R. 254; *Muir* v. *Edinburgh and District Tramways Company, Limited*, 1909 S.C. 244, 46 S.L.R. 248; *Stuart* v. *Great North of Scotland Railway Company*, July 9, 1896, 23 R. 1005, 33 S.L.R. 730; *Tannett, Walker, & Company* v. *Hannay & Sons*, July 18, 1873, 11 Macph. 931, 10 S.L.R. 642; *Irvine* v. *Glasgow and South-Western Railway Company*, 1913, 2 S.L.T. 452.

Argued for the defenders—There was no instance of a diligence of this nature being granted except in shipping cases which were of an exceptional character. The diligence would break the rule that confidential documents were privileged. Moreover the present case was covered by authority—*Stuart* v. *Great North of Scotland Railway Company* (*cit. sup.*); *Muir* v. *Edinburgh and District Tramways Company, Limited* (*cit. sup.*).

LORD PRESIDENT — After consultation with the Judges of the Second Division we are prepared to grant this diligence as now limited. It is, however, to be distinctly understood that the call in the first article is confined to reports of the character referred to in Lord Low's judgment in *Scott and Others* v. *Portsoy Harbour Trustees*, (1900) 8 S.L.T. 38, and in the judgment of this Division of the Court in *The Admiralty* v. *Aberdeen Steam Trawling Company, Limited*, 1909 S.C. 335.

The Court (the LORD PRESIDENT, LORD SKERRINGTON, and LORD GUTHRIE; LORD JOHNSTON and LORD MACKENZIE having been absent at the hearing) granted the diligence as craved.

Counsel for the Pursuer — Macquisten — Reid. Agent—James Scott, S.S.C.

Counsel for the Defenders — Russell. Agents—St Clair Swanson & Manson, W.S.

Saturday, March 13.

SECOND DIVISION.

[Sheriff Court at Hamilton.

ARCHIBALD RUSSELL, LIMITED *v.* KEARY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) (*i*) (*a*)—*Industrial Disease—Happening of Accident—Date of Disablemen — Certificate of Surgeon.*

The Workmen's Compensation Act 1906, sec. 8, enacts — "*Application of Act to Industrial Diseases.*—(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 . . ., whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease . . . as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications:—(*a*) The disablement . . . shall be treated as the happening of the accident. . . ."

A miner left his employment with a colliery company on 2nd September 1914 and joined the army, from which he was discharged on 29th September. On 8th October he obtained from a certifying surgeon a certificate that on 2nd October he had become disabled from work in respect of an industrial disease, viz., miners' nystagmus.

Held that in order to entitle the miner to compensation it was not necessary that at the date of disablement he should have been in the service of the company, and that the arbitrator was entitled to award compensation.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 8 (1) (i) (*a*), enacts—[*quoted in rubric*].

Archibald Russell, Limited, coalmasters, Cambuslang, *appellants*, and James Keary, miner, Cambuslang, *respondent*, brought in the Sheriff Court at Hamilton an arbitration in which the Sheriff-Substitute (HAY SHENNAN) awarded compensation, and stated a Case for the opinion of the Court of Session.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906 in an application presented by the respondent on 4th November 1914 to recover compensation in respect of miners' nystagmus, being one of the scheduled diseases to which the Act applies.

"Proof was led before me on 21st December 1914, when the following *facts* were

admitted or proved: — 1. The respondent, who is 29 years of age, had worked in the appellants' employment as a miner at Dechmont Colliery, Cambuslang, for fourteen years prior to 2nd September 1914. 2. This is a safety lamp pit, and about a year prior to the date of the proof a new type of safety lamp was introduced, intended to give a better light. After that, however, the respondent felt his eyes become unsteady, and he complained to the checkweighman at the pit that he had the "Glennie Blink" (a name given to nystagmus by miners). 3. The respondent continued to work up to 2nd September 1914, on which date he joined the army. He did not give up his employment in Dechmont Colliery on that date on account of the nystagmus, although he believed he would have to stop work on that account sooner or later. 4. When the respondent presented himself for medical examination on enlisting the doctor noticed that he had marked nystagmus not far from the disabling stage, but believed that he might improve under military life and passed him provisionally. In this doctor's opinion the respondent ought not to have been working underground at that date. 5. The respondent was discharged from the army on 29th September 1914, having failed in the sight test at the targets which was made in view of his possible promotion to sergeant. No evidence was led as to the nature of his military duties or their possible effect on the respondent's nystagmus. 6. On 8th October 1914 the respondent was duly certified as suffering from miners' nystagmus, the date of disablement being 2nd October 1914. He has not worked since that date except for one day, when he tried work on the surface at the tumblers, for which he was found unfit. He was totally incapacitated for work from 2nd October 1914 to 17th December 1914, after which he was able for certain forms of light work. 7. The appellants were the last employers of the respondent who employed him in mining, he having left their employment on 2nd September 1914.

"The respondent admitted that the *onus* lay on him to prove that this attack of miners' nystagmus was due to the nature of his employment with the appellants.

"The appellants argued that inasmuch as under section 8 (1) (*a*) of the Act the disablement is to be treated as the happening of the accident, the respondent's 'accident' could not be said to have arisen in the course of his employment with the appellants, he having left their employment a month previous to the date of his disablement.

"On 30th December 1914 I issued an award in the respondent's favour of £1 per week from 2nd October 1914 to 17th December 1914, and thereafter of 17s. 6d. per week. I was of *opinion* (1) that the respondent had proved that the miners' nystagmus from which he suffered was due to the nature of his employment with the appellants between 2nd October 1913 and 2nd September 1914, and (2) that section 8 of the Act does not require the date of disablement through miners' nystagmus to be a date during the currency of the employment to the nature of which the disease is due."

The *questions of law* for the opinion of the Court were—"1. In order to entitle a workman to compensation in respect of disablement through an industrial disease, is it necessary that at the date of disablement he should be in the service of the employer from whom compensation is claimed? 2. On the facts above stated was I entitled to award compensation to the respondent?"

Argued for the appellants—"A workman cannot recover compensation under the Act unless he can satisfy the Court that there is a particular time, place, and circumstance in which the injury by accident happened" —*per* Cozens-Hardy, M.R., in *Martin* v. *Manchester Corporation*, 1912, 5 B.W.C.C. 259, at 261. But in the case of a disease there was no accident. Accordingly in order to bring an industrial disease within the category of an accident, the Act by section 8 (1) (i) (*a*) fixed a fictitious time for its happening, viz., the granting of the surgeon's certificate of disablement although the disease had in fact been previously contracted. *M'Taggart* v. *William Barr & Sons, Limited*, December 15, 1914, 52 S.L.R. 125, was referred to.

Argued for the respondent—The Act made an industrial disease a statutory accident. Section 8 (1) (i) (*a*), which the appellants relied on, only concerned the machinery of compensation, and the appellants' argument was inconsistent with section 8 (1) (*c*). *Martin* v. *Manchester Corporation*, *cit.*, *and M'Taggart* v. *William Barr & Sons, Limited*, *cit.*, were irrelevant because they were cases which dealt with the statutory presumption contained in section 8 (1) (*c*), but the respondents did not invoke that presumption.

LORD JUSTICE-CLERK—I am very clearly of opinion that we cannot hold that the fair reading of this statute is as maintained by the appellants. This Act creates what may be called a fictitious form of accident—that is to say, the benefits of the Act entitling to compensation a workman who has suffered from an accident, are to apply to persons who have contracted disease in an employment from which such disease may be expected. Although that is the object of the Act the language of the statute is to a certain extent complicated.

Section 8 (1) (*a*) provides—"The disablement or suspension shall be treated as the happening of the accident"—that is to say, disablement occurring from disease has the same effect as if an accident had happened on a specified day. Why? Solely, as I read it, because it is a modification—as it is called by the Act itself—of the previous part of the clause which expressly gives a title to compensation. The clause provides "that he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications." It is quite plain that this clause and the modify-

ing clause apply to a case where disablement follows upon a course of disease, and it would be highly inconvenient that the workman should be entitled to trace back to the very beginning of the disease and claim compensation as from that time. Therefore the Act directs that disablement when ascertained is, as regards compensation, to be treated as an accident. I cannot read the terms of the statute in any other way.

That it was not intended to treat this matter as having no relation to what went before is quite manifest when one reads section 8 (1) (c) (ii), which says "if that employer" — that is, the employer who is charged with being liable to pay compensation—"alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer," he is entitled to prove the allegation and to escape paying compensation. That provision plainly implies that the matter is not to be settled merely by the accident of a certificate of disablement having been given upon a certain date. It entitles the employer who is being charged to say that the disease which led to there being a claim for compensation as if an accident had happened at the date of the certificate was previously contracted while the workman was in the employment of another employer and not in his employment.

The question whether or not you are to cut a sharp line and treat the disease as an accident which is to be held to have taken place on the date upon which the certificate was granted seems to me to admit of only one answer. There was no accident. It is only for the purpose of assessing the compensation that the idea of an accident comes in at all. There was a disease contracted—a disease which, after a certain time of development, led to disablement being certified—and the workman is entitled to compensation against the employer in whose service the disease was contracted, subject to this proviso, that there should be no compensation payable except from the date of its being certified that he is disabled, the date of the certificate being treated as if it were the date of an accident falling within the provisions of the Act.

On the whole matter I have no doubt whatever that the decision of the Sheriff-Substitute was right, and that we should answer the questions accordingly.

LORD GUTHRIE—I am of the same opinion. The Sheriff's first finding is not disputed, namely, that the respondent had proved that the miners' nystagmus from which he suffered was due to the nature of his employment with the appellants between 2nd October 1913 and 2nd September 1914. But the second finding, leading to the result at which the Sheriff arrived, is questioned, namely, that section 8 of the Act does not require the date of disablement through miners' nystagmus to be a date during the currency of the employment to the nature of which the disease is due.

The statute clearly distinguishes between actual accidents dealt with in section 1 and cases of industrial disease dealt with in section 8, in conjunction with the Third Schedule, which it was explained has, subsequent to the date of the Act, been enlarged so as to include the disease with which we are here dealing.

In this case the workman was unemployed at the date when he got the certificate, 8th October, and on the date which the surgeon certified as the date of disablement, 2nd October, because he had been discharged from the army on 29th September 1914. Mr Horne admits that if the surgeon when he granted the certificate on 8th October had dated the disablement back to 1st September when the workman was still in employment there would have been no case at all. But his view comes to this, that unless the workman at the date fixed as the date of disablement is actually in employment he has no claim whatever. I agree with your Lordship in thinking that if that is the result of the Act it would lead to the most gross injustice, and is a result that we could never reach unless the statute was absolutely clear and unambiguous.

It seems to me that the statute does not intend to make such a distinction between the case of an actual accident and what has been called a statutory or fictional accident. It certainly lays down in section 8 three conditions under which a workman shall be entitled to claim—first, that he cannot get anything for any period before the date of disablement; second, that he can only go back twelve months in his inquiry as to who is bound to pay; and third, that there are provisions for dividing the amount of compensation among the employers by whom he has been employed during these twelve months in which the disease ran its course. I agree with the Sheriff and also with your Lordship in holding that there is nothing in the Act to lead to the result which the appellants here contend for—a result leading to most anomalous effects which the statute never contemplated.

LORD HUNTER—I am of the same opinion. The reasoning of the appellant appears to me both unsound and artificial. Section 8 of the Workmen's Compensation Act extends the provisions of that Act to industrial diseases. In order to entitle a workman claiming under that section to recover he must have a certificate certifying that he is suffering from an industrial disease, and he must show that the disease is due to the nature of the employment in which he was employed within the preceding twelve months. These, I take it, are the only two conditions that require to be satisfied in order to the recovery of compensation under this section. To hold that because of the terms of head (a) of section 8 (1) disablement or suspension is to be treated as the happening of an accident so as to bar the workman from recovering in the event of his having left the employment at the time the certificate is given or at the time the disablement started seems to me to be a wholly unnatural construction of the words. It is quite inconsistent with other provisions of the section, to which your Lordships have already referred.

I might also point out that in (6) the Secretary of State has powers to make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order. That appears to show quite plainly that it never was intended to hold that for all purposes disablement was to be treated as an accident which alone was to give ground for a claim. It is not because of an accident that a claim is made under this section at all; it is because of an industrial disease which has been contracted in the employment.

LORD DUNDAS and LORD SALVESEN were not present, Lord Dundas being engaged in the Extra Division.

The Court answered the first question in the negative and the second question in the affirmative.

Counsel for the Appellants—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncrieff, K.C. — MacRobert. Agents — Simpson & Marwick, W.S.

Thursday, February 25.

FIRST DIVISION.

(SINGLE BILLS.)

CALDWELL & COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Confirmation by Court—Discretion of Court—Matters Primarily Domestic and Commercial—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 46, 50.

The Companies (Consolidation) Act 1908 enacts—Section 46—"(i) Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular . . . may . . . (*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets. . . ." Section 50—The Court . . . may make an order confirming the resolution on such terms and conditions as it thinks fit."

A company having by valid special resolution resolved on a reduction of capital on the ground that capital of the company had been lost or was unrepresented by available assets, one of the shareholders lodged objections, stating that there had been no loss of capital, and that the proceeding would affect his interests. The alleged loss of capital was based entirely on the opinion of the directors of the company and was unsupported by evidence. The Court *confirmed* the reduction of capital, subject to provision being made for the protection of the interests of the objecting shareholder.

Observed per curiam—(1) "If a company has passed a valid special resolution reducing its capital the Court has, under section 50, an absolute discretion to confirm or to refuse to confirm the reduction, or to impose such terms and conditions on the company as it thinks fit. The only express statutory limitation is that certain measures must be taken for the protection of creditors if they have a title to object to the reduction in terms of section 49." (2) "I cannot find any trace in the statute of a suggestion that the Court ought to review the opinion of the company and of its directors in regard to a question which primarily at least is domestic and commercial. There may possibly be cases where it would be the duty of the Court to enter into such an inquiry, but they would be very exceptional."

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), enacts—Section 46—(*quoted supra in the rubric*). Section 50—"The Court, if satisfied, with respect to every creditor of the company who under this Act is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit." Section 55—"In any case of reduction of share capital the Court may require the company to publish as the Court directs the reasons for reduction, or such other information in regard thereto as the Court may think expedient with a view to give proper information to the public, and, if the Court thinks fit, the causes which led to the reduction."

Caldwell & Company, Limited and Reduced, papermakers, Inverkeithing, *petitioners*, presented a petition to the First Division of the Court of Session craving the Court to make an order confirming a proposed reduction of their capital.

William Hay Caldwell, Morar, Inverness-shire, one of the shareholders in the company, *respondent*, lodged answers.

The *petition* set forth—"3. That the share capital of the company authorised by the memorandum is £50,000, divided into 50,000 shares of £1 each The whole of this capital has been issued and is fully paid. . . . 7. That on 24th May 1913 a fire took place in the works of the company which caused serious damage to the buildings, machinery, stock-in-trade, &c., and the stoppage of the works. The works are now in course of being reconstructed, but some months must elapse before they are in operation. 8. That at the time of the formation of the company the value placed upon goodwill was £20,257, 13s. 7d., but the same was reduced from time to time by sums applied out of the profits, so that at the close of the year to 28th September 1912 it amounted to £9163, 16s. 6d. A settlement has been made with the insurance company in respect of the fire loss for buildings, machinery, plant, stock,