if not, what is the nature and date of the breach of contract of which the defenders are to be found guilty.

The Court varied the interlocutor of 23rd June 1916 by deleting therefrom the words "disabled himself from fulfilling and thereby," and with that variation adhered to the interlocutors of 23rd June 1916 and 21st February 1917.

Counsel for the Pursuers (Respondents)—Constable, K.C.—Ingram. Agents—Shiels, Macintosh, & Ward, W.S.

Counsel for the Defenders (Appellants)—Blackburn, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Caledonian Railway Company—The Lord Advocate (Clyde, K.C.)—Watson, K.C.—Gentles. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, December 11.

FIRST DIVISION.

[Sheriff Court at Hamilton.

ARCHIBALD RUSSELL, LIMITED v. DOCHERTY

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) *and* (2), *Third Schedule—Industrial Disease—Liability of Last Employer—Duty to Give Information as to Previous Employers.*

A workman employed as a miner was disabled by miner's nystagmus and brought an arbitration for an award of compensation against the mineowners who were his employers at the date of disablement. He had not been employed in mining in the twelve months before disablement. He had given the employers all the information he possessed as to his employment during these twelve months, but the information given was not sufficient to enable them to take proceedings against other employers within the year before disablement. It was proved that the workman must have been affected by nystagmus before he entered the employment in which disablement occurred. *Held* (1) that the information given by the workman was sufficient in the sense of section 8 (1) (*c*) (*i*) of the Act, as it was in fact all the workman possessed, though it did not enable the employers to take proceedings against prior employers within the year before disablement; (2) that proof that the disease was not contracted while the workman was employed with the defenders did not, under sec. 8 (1) (*c*) (*i*), free them from liability to pay compensation.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8—"(1) Where (*i*) the certifying surgeon . . . certifies that the workman is suffering from a disease mentioned in the Third Schedule of 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 twelve months previous to the date of the disablement . . . whether under one or more employers, he . . . 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 the employment, subject to the following modifications:—(*a*) The disablement . . . shall be treated as the happening of the accident . . . (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due; provided that (i) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer, upon proving that the disease was not contracted whilst the workman was in his employment, shall not be liable to pay compensation; and (ii) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved, that other employer shall be the employer from whom the compensation is to be recoverable; and (iii) if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as in default of agreement may be determined in the arbitration under this Act for settling the amount of the compensation. . . . (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.

The Third Schedule as amended by the Order of the Secretary of State dated July 30, 1913 (S.R. & O., 1913, No. 814) contains in correlated columns, "The disease known as miner's nystagmus" . . . and "Mining."

Archibald Russell, Limited, *appellants*, being dissatisfied with an award of compensation under the Workmen's Compensation Act 1906 by the Sheriff-Substitute at Hamilton (SHENNAN) in an arbitration

between them and Edward Docherty, *respondent*, appealed by Stated Case.

The Case stated—"The following *facts* were admitted or proved:—1. On 4th December 1916 the respondent was certified by Dr Robert Clarke, a certifying surgeon, as disabled through miners' nystagmus from earning full wages as a miner, the date of the commencement of disablement being certified as 13th November 1916. 2. The respondent worked as a miner in the appellants' Loanend Colliery from 11th September 1916 to 11th November 1916, his average weekly earnings for that period being 57s. 2d. It was not suggested that this did not fairly represent his average weekly earnings, and I held that it did. 3. The respondent, who is fifty-six years of age, has worked as a miner for the greater part of his working life. There was no evidence that he had previously suffered from a disabling attack of miners' nystagmus, but he stated that he had ceased working underground in 1913 because he felt his eyes troubling him. Thereafter he worked mainly above ground until he entered the appellants' pit. 4. The respondent's existing tendency to suffer from miners' nystagmus was aggravated by his employment underground for the two months preceding 13th November 1916, the date of his disablement. 5. From and after 27th January 1917 the respondent was able to earn fair wages in an employment above ground. 6. On the respondent claiming compensation the appellants' agents requested the respondent to inform them where he had been employed during the year prior to 11th November 1916. On 26th January 1917 the respondent's agents wrote giving the following information:—'With regard to your request for information as to where he was employed for the year prior to 11th November 1916, he informs us that he was working in Loanend Colliery up to 11th November, and prior thereto in Greenfield Colliery belonging to the same company. He cannot give us the exact dates of his employment in these collieries, but informs us that in Loanend Colliery he was working to a contractor named John Watson, and in Greenfield Colliery he was working direct to the company. He thinks that he was about three months between these two collieries. Prior to that time he informs us he was employed with the Lanarkshire Tramways on the permanent way. He thinks he would be four or five weeks there. Prior to that he states he was employed as a pithead labourer with the Alloa Coal Co. Ltd. in Carnock Colliery, and he thinks he was about a fortnight there. Prior to that he was employed by Mr Jones, contractor, Larbert. He thinks he would be employed by him four or five months. Prior to that he was employed by the Plean Colliery Co. Ltd. as a pithead labourer, and thinks he would be about a month with them. Prior to that he states he was working with the Manor Powis Colliery Co. for about a fortnight as a labourer at the pithead. Prior to that he was employed by Messrs Muir Patton & Co., coal merchants, at their depot in Stirling, and thinks he would be there for about three months.' 7. On 16th February 1917 the appellants' agent wrote in reply—'The delay in regard to writing you as to whether or not we are to admit liability in this case is due to the inaccurate information which your client has given us. On writing to the different parties with whom he states he was employed, I find that in three instances, viz., Messrs Archd. Russell, Ld., Greenfield Colliery, Lanarkshire Tramway Coy., and the Manor Powis Coal Coy., he was not employed with these companies, that he has only been employed 17⅔rd weeks for the year preceding the date of his disablement, and of that period he only worked nine weeks altogether underground. You might see your client and ascertain whether my information is correct.' 8. On 21st February 1917 the respondent's agents replied—'We have to-day seen our client and read to him your letter of 16th inst. He is quite positive that he has been employed in Greenfield Colliery, also with the Lanarkshire Tramway Co., and also with the Manor Powis Coal Co. He cannot say how long preceding the date of disablement he was employed, nor can he say definitely whether he only worked nine weeks underground during that time. Our client has now given you all the information he can, and we must ask you to let us know definitely whether you are to admit or deny liability.' 9. The only evidence adduced on the subject-matter of this correspondence was that of the respondent and that of the appellants' cashier at Greenfield Colliery, who stated that he could find no trace of the respondent being employed there in July or August 1916. His evidence did not exclude the possibility that the respondent had been so employed. 10. The respondent is not a well-educated man, and his recollection especially of dates was not clear or accurate. He supplied the appellants with all the information he possessed on the subject.

"I was of *opinion* (1) that as the respondent's disablement through miners' nystagmus was aggravated by the nature of his employment with the appellants immediately prior to the date of disablement he was entitled to recover compensation from them, (2) that as he was able for surface work after 27th January 1917 he was thereafter entitled only to compensation in respect of partial incapacity, (3) that as he had furnished the appellants with all the information he possessed as to his employment during the twelve months prior to the date of disablement he had fulfilled his obligation under section 8, sub-section 1 (c), of the Act.

"Accordingly on 24th May 1917 I issued my award, finding the respondent entitled to compensation of £1 per week from 13th November 1916 to 27th January 1917, and thereafter of 10s. per week."

The *question of law* was—"On the foregoing facts was I entitled to award compensation to the respondent?"

To his award the Sheriff-Substitute appended the following *Note*:—"It is common ground that Docherty was working below ground in the respondents' Loanhead pit for some nine weeks immediately prior to the date at which his disablement is certi-

fied to have commenced. He is fifty-six years of age and has worked in pits for the greater part of his working life. There is no record of a previous disabling attack of miners' nystagmus, but he states that in 1913 he gave up working underground on account of his eyes, and did not resume until August 1916, working between these dates on the surface in various employments. The medical witnesses agree that if he had a tendency to miners' nystagmus it would be aggravated by nine weeks' work underground, and accordingly I reach the conclusion without difficulty that the disabling attack of 13th November 1916 was brought to a head by his work with the respondents during the preceding nine weeks.

"But the respondents contend that even if this be so they are not liable, because Docherty has not furnished them with the information to which they are entitled by virtue of section 8, sub. 1 (*c*), proviso (1), of the Act. Now I have no reason to believe that Docherty has not furnished the respondents with all the information that he possesses as to the names and addresses of his employers during the twelve months prior to 13th November 1916. But then it is argued that the information given is not 'sufficient to enable the employer to take proceedings under the next following proviso.' The sufficient answer is that I have no evidence in support of that contention. The only evidence on the point relates to his allegation that he was employed by the respondents in another of their pits for three or four weeks immediately before he went to Loanend, and even this evidence is not conclusive against the truth of this statement. There is nothing except a complaint by the respondents' agents in their letter of 16th February 1917. But, for all I know, Docherty's account given in his agents' letter of 26th January 1917 may be correct. He is rather illiterate and does not appear to have a very good memory. Curiously enough, it may be incidentally observed, the words 'the next following proviso,' cannot apply to proviso (iii), which deals with diseases contracted by a gradual process.

"Dr Wilson found Docherty fit for surface work on 27th January 1917, and I allow full compensation only down to that date. He has tested his earning capacity in the open market by engaging in work with Messrs Shanks & M'Ewan, with the result that in my opinion 10s. per week is an adequate award after 27th January 1917."

On 23rd October 1917, after a hearing, the Court remitted "to the Sheriff-Substitute as arbitrator to report (1) whether the information furnished by the respondent to the appellants was sufficient to enable them to take proceedings under sec. 8 (*c*) (ii) of the statute, and if insufficient, whether the insufficiency was due to the fact that there were no employers who 'employed him in the employment' during the twelve months previous to the date of the respondent's disablement other than the appellants; and (2) whether the appellants proved that the nystagmus which disabled the respondent on 13th November 1916 was not contracted whilst the respondent was in the appellants' employment."

The *report* of the Sheriff-Substitute was —"1. The information furnished by the respondent to the appellants was not sufficient to enable them to take proceedings under sec. 8 (*c*) (ii) of the statute in respect that it did not give full and specific details as to the employers who employed him during the twelve months previous to the date of his disablement. There was no evidence that during the said twelve months he had been employed in mining underground by any employer except the appellants. The only evidence as to the nature of his employment prior to August 1916 was that of the respondent himself to the effect that from 1913 to August 1916 he worked above ground.

"2. It was proved that the respondent must have been affected by miners' nystagmus when he entered the appellants' employment, but he was not at that date disabled by it from working underground. The onset of this disease is so gradual (it being a disease contracted by a gradual process) that it is hardly possible to fix a definite date at which it can be said to have been contracted. In a man of the respondent's age who has worked below ground for the greater part of his life, the 'gradual process' may have begun years ago. The eye weakness which caused him to cease working underground in 1913 is evidence that by that year the disease had been contracted, and the short period during which he was able to work underground immediately before the date of disablement proves, in light of the medical evidence, that he had not completely recovered from that attack."

Argued for the appellants—The respondent was disabled by miners' nystagmus; the certifying surgeon had not certified that that disease was not due to mining; and it had not been proved that the nystagmus was not due to mining; consequently the appeal proceeded on the footing that the nystagmus was due to mining—Workmen's Compensation Act 1907 (6 Edw. VII, cap. 58), section 8 (2), Third Schedule, and the Order of 30th July 1913. The only question was as to the employer who was liable to pay compensation. *Prima facie* the liability to pay compensation rested on the appellants, for they last employed the respondent in mining in the twelve months before his disablement—section 8 (1) (*c*). But the nystagmus had not been contracted in the employment with the appellants, and the respondent had not furnished the appellants with information sufficient to enable them to take proceedings under section 8 (1) (*c*) (i). The appellants were therefore free from liability to pay compensation —Section 8 (1) (*c*) (i). The general policy of the Act was to assimilate industrial diseases to accidents; disablement due to an industrial disease was treated as a personal injury by accident—section 8 (1). As at the date of disablement a right to compensation emerged, and from that date the period of a year was calculated, within which any of the employers of the workman in the

trade to which the nature of his disease was due might be found liable in compensation. But the question as to which of the employers was liable depended upon the contraction of the disease, not necessarily upon disablement. If the appellants had not been mine owners, though disablement took place while the respondent was in their employment, liability to pay compensation would not have rested on them, but *prima facie* would have rested on the last employer of the workman as a miner. It so happened that the appellants were mine owners, but they were entitled to be relieved of liability if they proved that the nystagmus had not been contracted in their employment. They had in fact so proved, and therefore the disease must have been contracted with another employer. That being so, the respondent had failed to furnish the appellants with sufficient information to enable them to take proceedings under section 8 (1) (*c*) (ii), and accordingly the appellants were not liable—section 8 (1) (*c*) (i). The limitation as to a year before the date of disablement was not to be read into section 8 (1) (*c*) (ii), and under that proviso the employer would go back and throw the liability to pay compensation on persons who employed the workman more than a year before the date of disablement. Further, that proviso applied to all the diseases in the Third Schedule as amended, whether contracted by a gradual process or not—*Mallinder* v. *Moons & Sons, Limited*, [1912] 2 K.B. 124. Proviso (iii) further differed from proviso (ii) in respect that if one employer was found liable in compensation he could sue in a separate process the other employers in the year, and get relief from them.

Argued for the respondents—The question of law should be answered in the affirmative. The case fell only under proviso (i), and under that proviso the appellants were liable. They were the last employers of the respondent in mining, and they could only escape liability if the respondent failed to give them the names and addresses of all the other employers who had employed him in "the employment" during the twelve months before disablement, or if the information given was not sufficient to enable the appellants to take proceedings under proviso (ii). The employment was mining, and accordingly the only obligation on the respondent was to give information as to the names and addresses of those who employed him in mining during the year. Further, the object of that proviso was to penalise a workman who withheld information he possessed, which if disclosed would be sufficient to enable the employers to get rid of the liability to pay compensation. But here the workman had given all the information he possessed; in actual fact that was not sufficient to enable the respondents to free themselves, but there was no obligation on the respondent to provide a substitute employer, but only to give such information as he had—*M'Taggart* v. *William Barr & Sons, Limited*, 1915 S.C. 224, 52 S.L.R. 125. The twelve months' limitation was necessarily carried into proviso (ii), for the leading provision of section 8 (1) was to fix the liability to pay compensation on one or other of the employers in the trade in question within twelve months of the date of disablement, and "proceedings under the next following proviso" could only be against one or other of the employers within the year. Further, the liability to give information was expressly limited to the employers within the twelve months.

At advising—

Lord President—It is agreed that on the 13th November 1916 the respondent, a miner engaged in mining in the appellants' colliery at Loanend, must be deemed to have suffered personal injury by an accident arising out of and in the course of his employment. In terms of the statute, section 8 (1) (*c*), the compensation payable to the respondent is recoverable from the appellants, because they were the last employers who engaged him at mining during the twelve months preceding the accident so-called. The appellants resist the claim for compensation on two grounds, which when closely examined will be found not to be separate and distinct but to be closely related to one another—(first) because they say the respondent failed to furnish them with the names and addresses of those who had employed him at mining during the twelve months preceding the date of the accident so-called; (second) because the appellants had proved that the disease—nystagmus—which disabled him was not contracted while in their employment.

Now it is quite true, as appears from the arbitrator's report before us, that the respondent failed to furnish the names and addresses of those who employed him at mining during the twelve months prior to the date of the accident, because there were none, and of course the respondent was not bound to furnish names and addresses which did not exist—he could not be asked to accomplish an impossibility. And consequently the respondents cannot take proceedings under proviso (ii). It was quite idle for them to prove, as from the report of the arbitrator before us they apparently did, that the disease was not contracted in their employment. In order to enable them to take proceedings under that section the allegation which they must prove is twofold—(First) that the disease was not contracted in their employment, and (second) that it was contracted in the employment of someone else who during the twelve months preceding the accident had employed the man in mining. And accordingly it is impossible for them to escape the responsibility laid on them by section 8 (1) (*c*) (iii), unless they can shift the responsibility on to somebody else who employed the man during the twelve months prior to the date of the accident. That, confessedly, they cannot do, and therefore I fear they must bear the consequences and pay the compensation alone.

No question arises in this case under section 8 (2), for the appellants did not

attempt to show that the disease was contracted not in the process of mining but in some other process altogether. There are, in short, only two ways in which an employer can escape where responsibility is thrown upon him under section 8 (1) (*c*) (iii)—(first) by shifting that responsibility on to some other employer who has engaged the man during the twelve months preceding the date of the accident in the process, or (second) by showing that the disease was not contracted whilst working at that process at all.

I am, therefore, for answering the question put to us in the affirmative.

LORD JOHNSTON—Docherty, the respondent, a man of fifty-six years of age, who had worked as a miner for most of his working life, voluntarily ceased working underground in 1913 by reason of trouble in his eyes. He again resumed work underground in the appellants' pit on 11th September, and was statutorily disabled on 11th November 1916. The Sheriff at Hamilton awarded him compensation, being of opinion (1) that his disablement through miner's nystagmus was aggravated by the nature of his employment with the appellants during the two months prior to his disablement, and (2) that he had furnished the appellants with all the information he possessed as to his employment during the twelve months prior to his disablement, as required by the statute.

The grounds of appeal are (1) that the miner's nystagmus which caused the disablement was neither contracted in nor aggravated by the respondent's employment with the appellants; (2) that he had failed to furnish the appellants with the information necessary in order to enable them to take proceedings under section 8 (1) (*c*) (ii) of the Act of 1906.

1st. In introducing the alternative of "aggravated by" after that of "contracted" I think that the appellants have taken a wrong view of the statutory provisions. The Sheriff has similarly gone wrong in the same direction in stating, as he does among the facts proved, *e.g.*, "The respondent's existing tendency to suffer from miner's nystagmus was aggravated by his employment underground" with the appellants from September to November 1916; and again that as his "disablement through miner's nystagmus was aggravated by the nature of his employment with the appellants . . . . he was entitled to receive compensation from them."

He further stated to us on remit that he held it proved that the respondent must have been affected by miner's nystagmus when in 1916 he entered the appellants' employment; that there was evidence that it had been contracted by 1913, though there was no statutory disablement; and that the short period during which he had been able to work underground in 1916 before disablement proved, in light of the medical evidence, "that he had not completely recovered from that attack."

I think that these considerations are entirely irrelevant and beside the statutory inquiry which in the circumstances the case involved.

2nd. The provisions of the 8th section of the Act of 1906 are based on a fictional conception, and are themselves arbitrary. They are, shortly, to the effect that disablement, as defined by the section, by industrial disease, as also defined by the section, shall entitle to compensation as if the disease were a personal injury arising out of and in the course of the employment. But from the outset the term of twelve months previous to the date of the disablement, which I shall call for shortness the statutory period, is of the essence of the whole enactment—(1) the disease must be due to nature of the employment in which the workman was employed within the statutory period, section 8 (1). A presumption that the disease is due to the nature of the employment (by which I understand not the service but the process engaged in under the service, though a contrary opinion seems to have been adopted by one, if not both, of the learned Judges in the Court of Appeal in *Dean's* case, [1914] 2 K.B. 213, is created in favour of the workman, putting the burden of proof to the contrary on the employer, section 8 (2). (2) The statutory industrial diseases are regarded as of two classes, viz., those which are contracted by a gradual process, and those the contraction of which can be referred to something definite as their origin. I think the scientific distinctions are idiopathic and non-idiopathic or perhaps symptomatic. But it is safer for me to distinguish my meaning by examples thus—Miner's nystagmus is a disease of gradual development, and therefore an instance of the first class, and anthrax is one of infection by contagion, and therefore an instance of the second class.

I have already, in my judgment in the case of *M'Gowan* v. *Merry & Cuninghame*, 1915 S.C. 34, 52 S.L.R. 30, endeavoured to show that the term "employment" is used in the section in a double and ambiguous manner. I think that the term "contracted" is also used in an ambiguous or at least a loose and indefinite way, for it is applied without discrimination to diseases of both the above classes.

The scheme of this artificial creation of liability by section 8 was, I am persuaded, this — not to look beyond the statutory period — injustice in the individual case might thereby be done to the employer, but in the long run things would average themselves, and the object of providing for a sharing of the burden of industrial disease by employer and employed be attained in a rough but effectual manner; therefore to make the last employer in the employment within the statutory period primarily liable, with relief in the case of the non-idiopathic class of disease against any other employer in whose employment he is able to prove that the disease was *in fact* contracted, and with a right to obtain contribution in the case of the idiopathic class of disease from other employers who during the statutory period have employed the workman in the same employment.

I think that the limitation to the statutory period was intended in both cases—non-idiopathic as well as idiopathic — and was probably not expressed in relation to the first case as it is in regard to the second, because non-idiopathic disease is rapid in its development, and its contraction beyond the statutory period hardly conceivable.

But section 8 (1) (*c*), which embraces the provisions intended to work out the scheme in question, is confused and ill to apply to all circumstances. I think that its sub-head (i) is made up of a preamble which really should have been a preamble to the whole sub-heads (i), (ii), and (iii), and not to the first of these sub-heads itself. Then, paraphrasing section 8 (1) (*c*) for shortness, the provision would run — Compensation shall be recoverable from the employer who last employed the workman during the statutory period in the employment to the nature of which the disease is due, provided the workman shall supply information as to the other employers who employed him in employment during the statutory period.

And (i) (applying, I think, only to the non-idiopathic class of disease), failing his doing so, or the information not being sufficient to enable the employer to proceed for relief under (ii), then the employer may discharge himself by proving that the disease was not contracted in his employment.

(ii) (Applying, I think, also to the non-idiopathic class of disease) If the employer alleges that the disease was *in fact* contracted in the employment of some other employer he may conjoin that other in the arbitration, and if he prove the fact obtain complete relief from him. Why I think that this provision was intended to be also limited by the statutory period is the reference in (i) to the information, limited by the preamble to the statutory period, which the workman is to be bound to supply to enable the last employer to proceed for relief under (ii) being sufficient to enable him to do so; the use of the words "in fact contracted" applicable to the non-idiopathic class of disease and not to the idiopathic, and the evident intention to restrict the scope of the arbitration inquiry to the statutory period. But while I infer that this was intended I accept that it is not expressed. But having regard to the terms of (iii) I think that it is a clear and necessary inference that (ii) only applies to the non-idiopathic class of disease.

(iii) If the disease is one of the idiopathic class (this being expressed) the last employer in the employment to the nature of which the disease was due may obtain contribution from all other employers who have employed the workman in the same employment within the statutory period. It was to supply him with their names, just as much as to supply the employer to whom sub-head (ii) applies, that I think what I have called the preamble was intended. The remedy of this sub-head was, I think, so framed in contradistinction from that of sub-head (ii) just because it is impossible to predicate of an idiopathic industrial disease that at any point of time it "was *in fact* contracted."

The remedy to the employer in the idiopathic and the non-idiopathic class of diseases is thus different—*Mallinder*, [1912] 2 K.B. 124.

On a consideration, then, of the terms of section 8 (1) (*c*) I think it is clear that in the case of an idiopathic disease to which (*c*) (iii) applies, whatever may be the case with regard to that of a non-idiopathic disease, we have nothing to do with the fact or point of time of contraction, and nothing to do with aggravation in the service of one employer or another. If the fact of statutory disablement from such disease is ascertained, then the employer who last employed the workman in the employment to which the disease is due within the statutory period is liable in compensation, and his sole remedy is to obtain contribution from others who have also employed him in the same employment within the statutory period.

The appellant's first ground of appeal is therefore unavailing to him.

3rd. The appellant's objection to the insufficiency of the information supplied him is inapplicable to the circumstances, as he desiderates it to enable him to take proceedings under section 8 (1) (*c*) (ii) under which he has no remedy. If he meant to say (*c*) (iii), then I agree that the information was all that the workman could give, and at the same time so far as I can see sufficient.

The answer to the query put falls therefore to be in the affirmative.

Lord Mackenzie — In my opinion the question ought to be answered in the affirmative.

The workman was employed by the appellants in mining underground at the date when he obtained a certificate from the surgeon that he was disabled through miner's nystagmus from earning full wages. He is therefore entitled to the presumption in his favour created by section 8 (2) of the Act, and the Third Schedule, as amended, that the disease (miner's nystagmus) was due to the nature of the employment (mining). In order to rebut that presumption the employers must prove that the disease is not due to the nature of the employment. This they have not done. It does not avail them under section 8 (2) to prove that the disease is not due to the workman's employment with them.

The workman is therefore entitled to compensation under the Act in terms of section 8 (1) (unless debarred by the provisions that follow), as if the disease "were a personal injury by accident arising out of and in the course of that employment." The modifications which follow disentitle the workman from receiving compensation only in two events, *i.e.*, under section 8 (1) (iii) (*b*), if he wilfully makes a false representation at the time of entering the employment that he had not previously suffered from the disease, or if he fails in the duty imposed upon him by section 8 (1) (iii) (*c*) (i) to "furnish the employer with such information as to the names and addresses of all the other employers who employed him in the employment during" the preceding twelve months as he may possess. The

argument for the employers in the present case is founded upon the words which immediately follow, viz.—"If such information is not furnished or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer, upon proving that the disease was not contracted whilst the workman was in his employment, shall not be liable to pay compensation." It is not said that the workman did not furnish such information as he possessed, but it is said that such information is not sufficient to enable the employers to take proceedings, and that therefore they are free from liability if they prove that the disease was not contracted whilst the workman was in their employment. The reason why the information is not sufficient in the present case is because in point of fact there was no such employment with another employer within the preceding twelve months. I do not think that the proper construction of the sub-section is one which would, in that state of the facts, deprive the workman of compensation if the last employers proved that the disease was not contracted whilst the workman was in their employment. The purpose of enacting that the workman shall furnish information is to enable the employer to operate any relief which the circumstances permit against another employer or employers, if such there are. The event upon which, under sub-section (*c*) (i), the workman may forfeit the right to compensation vested in him is if he fails in the positive duty laid upon him. There is no positive duty imposed on the workman to furnish information sufficient to enable the employer to take proceedings, but only an obligation to furnish such information as he may possess. I read the words which follow—"if such information is not furnished, or is not sufficient to enable that employer to take proceedings"—as only imposing a duty upon the workman to do what he can to make available to the employer any right of relief the circumstances may permit of under the Act. This duty the workman has discharged; and therefore the condition upon which alone is the employers' right to be free on proving that the disease was not contracted in their employment does not arise. In this view no question arises in the case under sub-section (*c*) (iii).

LORD SKERRINGTON—I agree with your Lordships. I desire merely to add that I reserve my opinion upon a question which does not require to be decided, namely, whether the time limit of twelve months ought to be applied and read into section 8 (1) (*c*) proviso (ii) of the Workmen's Compensation Act 1906.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Sandeman, K.C.—Gentles. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Chisholm, K.C.—Inglis. Agent—E. Rolland M'Nab, S.S.C.

Saturday, December 8.

FIRST DIVISION.

[Lord Ormidale Ordinary.

CRAIG *v.* EDINBURGH PARISH COUNCIL.

Bankruptcy — Process — Reduction — Competency — Sheriff — Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), secs. 82 and 166 — Reduction of Decree of Sheriff in Action by Preferential Creditors against Trustee in Bankruptcy.

The Bankruptcy Act 1913 enacts—Section 82—"The judicial factor, the trustee, and commissioners shall be amenable to the Lord Ordinary and to the sheriff, although resident beyond the territory of the sheriff, at the instance of any party interested, to account for their intromissions and management, by petition served on them. . . ." Section 166—"It shall be competent to bring under review of the Inner House of the Court of Session, or before the Lord Ordinary in time of vacation, any deliverance of the sheriff after sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the sheriff-clerk within eight days from the date of such deliverance, failing which the same shall be final. . . ."

Preferential creditors of a sequestrated bankrupt brought an action in the Sheriff Court concluding for an accounting by the trustee in the sequestration of his whole intromissions with the bankrupt's estate and for a payment of certain sums alleged to be due to them preferably. They stated a plea founding on section 82 of the Bankruptcy Act 1913, and alleged that the trustee had been guilty of malversation in paying the debts due to other creditors. The trustee averred that the whole estate had been properly paid away before the preferential creditors lodged their claims, upon which he refused to make any adjudication. He stated no plea to the competency of the action. The Sheriff-Substitute ordered accounts, and these having been lodged, granted decree against the trustee for the sums sued for. The trustee appealed to the Sheriff, who refused the appeal as incompetent. The trustee then brought an action concluding for reduction of the decrees of the Sheriffs and the extract following thereon. *Held* that the action must be dismissed, *per* the Lord President, on the ground that the parties having joined issue in the Sheriff Court upon the construction of section 82 of the Bankruptcy Act 1913, the only competent mode of appeal was