

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

in the Summar Roll it appeared that the parties were at variance as to the facts. On their consenting to a remit to the Sheriff-Substitute of Lanarkshire, before whom certain claims under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) arising out of the death of the petitioner's husband were depending, the Court (consisting of the LORD JUSTICE-CLERK, LORDS DUNDAS, SALVESEN, and GUTHRIE) pronounced this interlocutor:—"The Lords, of consent, remit to the Sheriff-Substitute of Lanarkshire at Glasgow, before whom the claims under the memorandum of agreement between the petitioner and Nobel's Explosive Company, Limited, are depending, to inquire into the circumstances set forth in the petition and answers, to take the evidence adduced by the parties, and to report *quam primum*; further, if he shall see cause to do so, to report upon the demeanour and credibility of the witnesses."

Counsel for the Petitioner—Maclaren. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Respondent—Lippe. Agent—T. M. Pole, Solicitor.

## HIGH COURT OF JUSTICIARY.

Thursday, November 6.

(Before the Lord Justice-General, Lord Johnston, Lord Mackenzie, and Lord Skerrington.)

AULD v. PEARSON.

*Justiciary Cases—Motor Car—Heavy Motor Car—Speed Limit—Speed Limit Depending on Specified Axle-Weight—Car having One Axle over and the Other under the Specified Axle-Weight—Heavy Motor Car (Scotland) Order 1905, art. 7—Motor Car Acts 1896 and 1903 (59 and 60 Vict. cap. 36, and 3 Edw. VII, cap. 36).*

The Heavy Motor Car (Scotland) Order 1905, art. 7, provides that if a heavy motor car has all its wheels fitted with pneumatic tyres, the speed limit at which it may be driven shall not exceed "(a) twelve miles an hour where the registered axle-weight of any axle does not exceed six tons, and (b) eight miles an hour where the registered axle-weight of any axle exceeds six tons."

*Held (dub. Lord Johnston)* that a person had exceeded the speed limit, as fixed by the Order, who had driven at twelve miles an hour a heavy motor car fitted with pneumatic tyres, the registered axle-weight of which was over six tons as regards the back axle, and only 2 tons 2 cwts. as regards the front axle.

The Heavy Motor Car (Scotland) Order 1905, made by the Secretary for Scotland, in virtue of the powers contained in the Motor Car Acts 1896 and 1903, enacts—"Article 2—In the Regulations the expression 'heavy

motor car' means a motor car exceeding two tons in weight unladen. The expression 'trailer' means a vehicle drawn by a heavy motor car. The expression 'registering authority' means, in relation to a heavy motor car, the council of a county, or of a registering burgh, by whom the heavy motor car has been or can be registered, in pursuance of the Motor Car Act 1903, and of the Motor Car Registration and Licensing (Scotland) Order 1903. The expression 'axle-weight' means, in relation to an axle of a heavy motor car or of a trailer, the aggregate weight transmitted to the surface of the road or other base whereon the heavy motor car or the trailer moves or rests, by the several wheels attached to that axle when the heavy motor car or the trailer is loaded. The expression 'registered axle-weight' means, in relation to an axle of a heavy motor car, the axle-weight of that axle, as registered by the registering authority in pursuance of the Regulations. . . . Article 7—The speed at which a heavy motor car is driven on any highway shall not exceed eight miles an hour: Provided that (a) if the weight of the heavy motor car unladen exceeds three tons, or (b) if the registered axle-weight of any axle exceeds six tons, or (c) if the heavy motor car draws a trailer, the speed shall not exceed five miles an hour: Provided also that if the heavy motor car has all its wheels fitted with pneumatic tyres or with tyres made of a soft or elastic material, the speed at which the heavy motor car may be driven on any highway shall not exceed (a) twelve miles an hour where the registered axle-weight of any axle does not exceed six tons, and (b) eight miles an hour where the registered axle-weight of any axle exceeds six tons."

James Black Pearson, chauffeur, respondent, was charged in the Sheriff Court at Greenock, on 6th June 1913, at the instance of William Auld, Procurator-Fiscal of the Lower Ward of Renfrewshire, *appellant*.

The complaint was "that on 13th May 1913, between 6:30 and 7 a.m., in Dalrymple Street and Shaw Street, both public highways in the burgh of Greenock, you, being the driver of a heavy motor car, No. V. 1286, belonging to the Glasgow Motor Carriers, Limited, 299 Victoria Road, Glasgow, which car, when unladen, weighs more than three tons, and the registered axle-weight of the back axle of which weighs more than six tons, did drive said car along said highways, between a point in line with the west side of the Burgh Municipal Buildings, in said first-mentioned street, and a point in said last-mentioned street drawn from the centre of Cross-shore Street, where said street joins Dalrymple Street aforesaid, at the rate of twelve miles an hour, being a speed exceeding eight miles an hour, contrary to the Heavy Motor (Scotland) Order 1905, article 7, duly made and issued by His Majesty's Secretary for Scotland in virtue of the Motor Car Acts 1896 and 1903."

Pearson was found not guilty, whereupon the prosecutor took a Case for appeal.

The Sheriff-Substitute (WELSH) stated