Thursday, July 13.

FIRST DIVISION.

GARRETT *v.* WADDELL & SON.

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

A certifying surgeon on 25th November 1910 granted a certificate that a miner was suffering from a certain industrial disease to which the Workmen's Compensation Act 1906 applied, and was thereby disabled from earning full wages at the work at which he had been employed, and that the disablement commenced on 6th October 1910. The employers being aggrieved had the matter referred to a medical referee pursuant to section 8 (1) (*f*) of the Act. The medical referee on 13th December 1910 dismissed the appeal "with this restriction, that [the workman] is now able to resume his ordinary work." The employers paid compensation from 6th October 1910 to 13th December 1910, when the workman returned to work. On 24th January 1911 the workman instituted proceedings for an award of partial compensation, and averred that owing to his not yet having fully recovered his earning capacity he was only able to earn £1 a week or thereby, and he asked for a proof of that averment. The Sheriff-Substitute acting as arbitrator found in law that the medical referee's decision, including the restriction above quoted, was final, and barred the workman from insisting on payment beyond 13th December 1910, and dismissed the petition.

Held that the restriction was outside the function of the medical referee and must be regarded as *pro non scripto*, and that the arbitrator was wrong in dismissing the application.

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 Workshops Act* 1901 (1 *Edw. VII, cap.* 22) *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;* . . . (*f*) *If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement . . . the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final.* . . . (6) The Secretary of State may 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."

By order of the Secretary of State, dated 22nd May 1907, the provisions of section 8 were extended, *inter alia*, to acute bursitis over the elbow (miners' beat elbow).

John Garrett, miner, Lesmahagow, *appellant*, claimed compensation under the Workmen's Compensation Act 1906 from Waddell & Son, coalmasters, Auchenbeg Colliery, Coalburn, Lesmahagow, *respondents*, and being dissatisfied with a determination of the Sheriff-Substitute at Lanark (Scott Moncrieff), acting as arbitrator under the Act, appealed by Stated Case.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, brought in the Sheriff Court of Lanarkshire at Lanark, at the instance of the appellant, in which the Sheriff is asked to award him partial compensation under and in terms of said Act, at the partial rate of 9s. 4d. per week from 13th December 1910, with expenses.

"The case was debated before me on 24th February 1911, when the following facts were established—(1) That on 25th November 1910 the appellant, who was a miner in the respondent's employment, submitted himself for examination to Dr John Harrison, certifying surgeon, appointed under the Factory and Workshops Act 1901 for the district of Lesmahagow, and obtained a certificate from the said Dr Harrison to the following effect, viz., 'I am satisfied that he (appellant) is suffering from acute bursitis over the elbow (miner's beat elbow), being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the 6th day of October 1910;' (2) That the respondents being aggrieved by the action of the certifying surgeon in granting said certificate, applied for a reference to the medical referee, pursuant to section 8, sub-section (1) (*f*), of the Workmen's Compensation Act 1906, and the regulations made thereunder by the Secretary of State, on the grounds 'that the said John Garrett (the present appellant) had not contracted the disease in respect of which the said certificate was given, or alternatively that he was not suffering from the disease therein specified, so as to be disabled from earning full wages at the work at which he was employed;' (3) That the matter was referred to Dr Alexander Scott, 4 Newton Terrace, Glasgow, one of the medical referees appointed by the Secretary of

State for the purposes of the Workmen's Compensation Act 1906, who, having personally examined the appellant, decided, on the 13th day of December 1910, as follows:—'I dismiss the appeal of Waddell & Son (the present respondents) against the certificate of disablement given to John Garrett on the 25th day of November 1910, with this restriction, that the said John Garrett is now able to resume his ordinary work;' (4) That after the said medical referee had so decided, the respondents paid to the appellant compensation under the Workmen's Compensation Act 1906, at the rate of 16s. 3d. per week from 6th October 1910 to 13th December 1910; (5) That after said report of the medical referee was issued, the appellant returned to work as a miner; (6) That on 24th January 1911 the appellant instituted the present preceedings for an award of partial compensation at the rate of 9s. 4d. per week, and averred, 'Appellant, owing to his not yet having fully recovered his earning capacity, is only able to earn wages amounting to £1 or thereby per week.'

"The appellant asked for a proof of this averment, to which the respondents objected on the grounds that the decision of the medical referee precluded the appellant from claiming compensation as from and after the date of the medical referee's decision, viz., 13th December 1910, down to which date he had been paid full compensation.

"I found in point of law that the medical referee's decision, including the foregoing restriction, was final, and barred the appellant from insisting on payment of compensation beyond said 13th December 1910.

"Reference was made in the course of the debate to the memorandum of the Secretary of State to medical referees, of October 1910, which pointed out that they were at liberty to determine the present condition of the workman. I accordingly dismissed the petition and refused to allow the appellant a proof.

"The *question of law* for the opinion of the Court is—Was the arbitrator right in dismissing the appellant's application for arbitration?"

Argued for the appellant—The Sheriff had misinterpreted section 8. The medical referee had nothing to do with the date when incapacity ceased; he had merely to determine whether the workman "is suffering from" a disease to which the Act applied, and whether he was thereby disabled from earning full wages. "Is suffering" meant at the date of the examination by the surgeon, not that of the examination by the medical referee. The *punctum temporis* was in each case the same. When compensation was agreed to be paid, it could only be brought to an end by agreement or by application to the arbitrator—*King* v. *United Collieries Limited*, 1910, S.C. 42, 47 S.L.R. 41.

Argued for the respondents—The medical referee had to say whether the workman "is suffering"—that meant "is suffering" at the date of the referee's examination. By section 8 (1) (*f*) "the matter" was to be referred to a medical referee in accordance with regulations by the Secretary of State. By "matter" was meant the whole matter other than the amount of compensation. Reference was also made to regulation 16 of the statutory regulations dated June 25, 1907, made by the Secretary of State, and to article 15 of the first schedule, and the following cases—*M'Avan* v. *Boase Spinning Company Limited*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772, followed in *Ferrier* v. *Gourlay Brothers*, March 18, 1902, 4 F. 711, 39 S.L.R. 453, and *Bryce & Co.* v. *Connor*, December 6, 1904, 7 F. 193, 42 S.L.R. 154.

At advising—

LORD PRESIDENT—[*After narrating the facts*]—The learned Sheriff-Substitute found in law that the medical referee's decision, including the foregoing restriction, was final, and barred the appellant from insisting on payment of compensation beyond said 13th December 1910. He accordingly refused to allow the appellant a proof, and dismissed the petition, and the question raised by the Stated Case is whether he was right in dismissing the appellant's crave for an arbitration.

The matter is one of very narrow compass, and it turns entirely upon the provisions of the 8th section of the Act of 1906, which for the first time introduced what in its own phraseology is called the application of the Act to industrial diseases. I need not read the whole of that section; your Lordships are aware that it provides that a certifying surgeon has to certify that the workman is suffering from a disease mentioned in the third schedule of the Act, and is thereby disabled from earning full wages at the work at which he is employed. When that is so certified, then according to the statute "he" (that is, the workman) "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 certain modifications which I need not enter into. The Act goes on to provide, in sub-section (1) (*f*), "If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement, or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final."

Now I confess I do not think these provisions leave any room for doubt. You have first of all a certificate by a certifying surgeon; if that is to the effect that the man is suffering from an industrial disease, and is thereby unable to earn full wages at the work at which he had been employed, then the result is that he is *de plano* entitled to compensation, but that his disease shall be treated as if it were an accident—in other words, the proceedings are to go

on just as if an accident in the ordinary sense of the word had happened. But then comes the sub-section, which says that if a party is aggrieved by this certificate being granted or refused, there is an appeal to a medical referee, whose decision shall be final. Now that is a decision, I think, upon one thing only, namely, whether the granting or refusal of the certificate was right. This was a case of granting. It seems to me that the medical referee could only devote his attention under the statute to yea or nay upon one point, namely, was the certificate rightly granted? Of course that yea or nay upon one point really involves two heads of inquiry—first, was it an industrial disease? and second, was the workman thereby disabled from earning full wages at the work at which he had been employed? Accordingly I think that when the medical referee went on and added a rider that at the time of this examination the workman had recovered, he was doing something which was outside his province under the statute, and his note therefore must, I think, be treated as *pro non scripto*. If that addition were contradictory we might have to deal with it otherwise (as I shall have to remark in a subsequent case), but here I point out that there was nothing contradictory in his decision; he dismissed the appeal; in other words, he said the certifying surgeon was right. I do not think he had any right to make the additional statement, and therefore I do not think that part of his deliverance is protected by the finality clause of the statute. Accordingly I think the Sheriff was wrong in not going on with the petition. Of course it would have been perfectly open to the employer in the course of the subsequent proceedings to show that the workman had now recovered, but that should be done in the ordinary way in the course of the arbitration. Whereas the certifying surgeon put the industrial disease on the footing of an accident, yet the Sheriff was entitled to say whether the man had now recovered, and whether his compensation should now cease. Accordingly I think the question of law must be answered in the negative, and the case remitted to the Sheriff for further procedure.

LORD JOHNSTON—The question of law in this case must, I think, be answered in the negative.

This is a case of alleged industrial disease contracted in the workman's employment, for which for the first time compensation was provided by the Workmen's Compensation Act 1906. The provisions to that end, and particularly those relating to medical certificates, have not as yet had much, if any, attention paid to them. The Act (section 8) calls into its service the body of certifying surgeons appointed under the Factory and Workshop Act 1891. The workman (taking only those parts of this long section with its ten sub-sections which expressly bear on the point in question) is (sub-section 1) entitled to go to the certifying surgeon for the district in which he is employed, and if the surgeon certifies that he "is suffering from" a scheduled industrial disease, "and is thereby disabled from earning full wages at the work at which he was employed," then the workman is to be entitled to compensation under the Act, as if the disease were a personal injury by accident arising out of and in the course of that employment. The disablement is to be treated as the happening of the accident.

Now the application to the certifying surgeon is obviously *ex parte*, and accordingly section 8, sub-section 1 (*f*), provides for what may be termed an appeal from the certifying surgeon to a medical referee—the medical referees being a body of medical men already appointed under the previous Act of 1897, and continued under this Act, primarily for other purposes. The precise expressions of the sub-section are—"If an employer or workman is aggrieved by the action of a certifying . . . surgeon in giving or refusing to give a certificate of disablement . . . for the purposes of this section, the matter shall . . . be referred to a medical referee, whose decision shall be final," and the date of disablement for the purposes of the Act is (section 8, sub-section 4) to be the date which the certifying surgeon certifies as the date on which disablement commenced; or if he is unable to certify such date, then the date of his certificate; or if the certifying surgeon has refused a certificate, and the medical referee allows an appeal against his refusal, then such date as the medical referee may determine.

Now I think it is clear that the sole function of the certifying surgeon, and of the medical referee on appeal, is to determine whether the workman is suffering from a scheduled industrial disease, and is thereby disabled from earning full wages in his employment, and, subject to the provisions of section 8, sub-section 4, to fix the date on which disablement commenced.

This procedure, then, before certifying surgeon and medical referee does not amount to more than fixing finally, for the purposes of a claim for compensation under the Act, that the workman has received personal injury from what, though it is not an accident in ordinary acceptation, is to be deemed an accident arising out of and in the course of his employment. Workman and employer are, as regards the adjustment of compensation and everything incidental thereto, left to the general provisions of the Act and its schedules. They may either come to an agreement or institute a statutory arbitration. As it is only in the case of disablement from earning full wages that an application to a certifying surgeon with an appeal to a medical referee is provided, it is obvious that much may occur requiring the intervention of the Sheriff as arbiter. For not only may the amount of compensation due be disputed, but the employer may offer to prove (section 8, sub-section 2) that the disease was not due to the nature of the employment, or questions may arise as to

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

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

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

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

LORD SKERRINGTON—I concur.

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

The Court pronounced this interlocutor—

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

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

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

Thursday, July 13.

FIRST DIVISION.

[Sheriff Court at Hamilton.

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

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

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

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

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

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