Counsel for the Pursuers and Appellants —J. R. Christie—Macdonald. Agent—T. M. Pole, Solicitor.

Counsel for the Defenders and Respondents—Horne, K.C.—J. H. Henderson. Agents—Boyd, Jameson, & Young, W.S.

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*Tuesday, December* 10.

## SECOND DIVISION.

[Sheriff Court at Hamilton.

## DARROLL *v.* GLASGOW IRON AND STEEL COMPANY, LIMITED.

*Master and Servant — Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *Schedule I* (16)—*Review of Weekly Payment—Industrial Disease—Liability to Recurrence of Disease—Onus.*

In an application under the Workmen's Compensation Act 1906 for review of a weekly payment made to a workman in respect of his incapacity for work which resulted from an attack of nystagmus, the arbiter found that although the workman had "now completely recovered" from the attack, he was liable to a recurrence of the disease, but that the evidence was inconclusive as to whether this liability was due to constitutional predisposition or to the original attack.

*Held* upon these findings that the employers were entitled to have the weekly payments ended, because the workman had not discharged the *onus* of proving that his liability to a recurrence of the disease was due to the original attack.

Richard Darroll, miner, Blantyre, *appellant*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (SHENNAN) at Hamilton, whereby in an application at the instance of the Glasgow Iron and Steel Company, Limited, coalmasters, Motherwell, *respondents*, the compensation paid by them to him was ended.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, under a minute presented by the respondents craving review of the weekly payment of 8s. 10d. made by the respondents to the appellant in respect of nystagmus acquired by him while employed as a miner at Parkneuk Colliery, Motherwell, belonging to the respondents, on 3rd September 1910. The respondents desire to have the weekly payment of compensation ended or diminished in respect it is alleged that the incapacity of the said appellant for work for which the said weekly payment was awarded has entirely ceased or at least has become greatly lessened.

"Proof was taken before me on 29th July 1912, when the following *facts* were admitted or proved—(1) The appellant having been duly certified as suffering from miner's nystagmus from 3rd September 1910, was paid full compensation at the rate of 13s. 10d. per week down to 27th October 1911. (2) On 27th October 1911, in proceedings for review instituted by the respondents, the appellant's compensation was reduced to 8s. 10d. per week on the ground that he was fit for surface work of a limited character. (3) The medical witnesses for both parties concurred in stating that Darroll has now completely recovered from this attack of nystagmus. No one could now detect that he has ever suffered from nystagmus, and he has good sight. (4) The medical witnesses on both sides also agreed in thinking that it would be unwise for Darroll to resume work underground, because of the danger of a second attack of nystagmus, but the evidence was inconclusive as to the cause of this liability to recur. On the one side the opinion was given that the liability to recur was due to the constitutional predisposition of the appellant, which the first attack merely revealed. On the other side the opinion was expressed that the first attack left a condition of susceptibility to subsequent attacks. The evidence was entirely in the region of opinion and was inconclusive.

"I held that the *onus* was on the appellant to prove that his present susceptibility to a recurrence of nystagmus is due to the attack of September 1910, from which he has now recovered. As he had failed to discharge this *onus*, and had completely recovered from the first attack, I ended his compensation."

The *questions of law* were—"(1) Was the *onus* on the appellant to prove that his existing susceptibility to a recurrence of nystagmus is due to his previous attack? (2) On the facts stated was the appellant's compensation rightly ended."

Argued for the appellant—The findings showed that although the appellant had recovered from the attack of nystagmus he was liable to a recurrence of the disease. The liability to a recurrence of the disease, since it hindered him from resuming his former occupation, was incapacity for work within the meaning of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), which entitled him to compensation—*Thomas* v. *Fairbairn, Lawson, & Company, Limited*, 1911, 4 B.W.C.C. 195; *Ball* v. *Hunt*, [1912] A.C. 496, 49 S.L.R. 711; *Duris* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708; *Garnant Anthracite Collieries, Limited* v. *Rees*, 1912, 5 B.W.C.C. 694; *Jones* v. *New Brynmally Colliery Company, Limited*, 1912, 106 L.T. 524, 5 B.W.C.C. 375; *Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862. It was the defenders who were seeking to disturb the *status quo*, viz., the payment of compensation, and therefore the *onus* was on them of showing that the appellant was no longer entitled to compensation. In any event, since the appellant had shown that he was still incapacitated, there was an *onus* on the respondents to show that the cause of the incapacity, viz., the liability to a recurrence of the disease, was not the result of the original attack—*M'Callum* v. *Quinn*, 1909 S.C. 227, 46 S.L.R.

141; *M'Ghee* v. *Summerlee Iron Company, Limited*, 1911 S.C. 870, 48 S.L.R. 807; *Borland* v. *Watson, Gow, & Company, Limited*, 1912 S.C. 15, *per* Lord Dundas at p. 17, 49 S.L.R. 10, at p. 11; *Higgins* v. *Poulson*, [1912] 2 K.B. 292; *Cory Brothers & Company, Limited* v. *Hughes*, [1911] 2 K.B. 738; *M'Ewan* v. *Wm. Baird & Company, Limited*, 1910 S.C. 436, 47 S.L.R. 430. The sole function of the certificate required by section 8 (1) (*i*) of the Act was to certify that the workman was suffering from an "industrial" disease—*Garrett* v. *Waddell & Son*, 1911 S.C. 1168, *per* Lord Johnston at p. 1172, 48 S.L.R. 937, at p. 939. Having obtained it, a workman's rights under the Act against his employer were the same as if he had suffered a personal injury.

Argued for the respondents—The findings showed that the appellant had "now completely recovered." Therefore the respondents had discharged the *onus* on them, and the appellant was no longer entitled to found on the certificate, which was his sole title to sue. There was an *onus* on the appellant to show that if he was still incapacitated, the incapacity was the result of the original attack. This he had not done. The *onus* on a workman of proving a supervening incapacity and of connecting it with the original injury was just as heavy as was the *onus* in the case of the original injury—*Jones* v. *New Brynmally Colliery Company, Limited* (*cit.*); *Garnant Anthracite Collieries, Limited* v. *Rees* (*cit.*); *M'Ghee* v. *Summerlee Iron Company, Limited* (*cit.*), *per* Lord Dundas, 1911 S.C. at p. 874, 48 S.L.R. at p. 810; *Borland* v. *Watson, Gow, & Company, Limited* (*cit.*), *per* Lord Justice-Clerk, 1912 S.C. at p. 18, 49 S.L.R. at p. 12. The case of *Cory Brothers & Company, Limited* v. *Hughes* (*cit.*) only showed that there was an *onus* on the employer, if he applied for an alteration of the award, to show a change of circumstances. In the present case the respondents had shown that the appellant had "now completely recovered." The case of *M'Callum* v. *Quinn* (*cit.*) was different, because there the employers failed to show complete recovery—see opinion of Lord M'Laren, 1909 S.C. at p. 229, 46 S.L.R. at p. 142.

At advising—

LORD JUSTICE-CLERK—By statutory rules passed under authority of the Workmen's Compensation Act an affection of the eyes to which miners are liable, and which is called nystagmus, is placed in the category of accidents falling under the statute. This affection is one from which complete recovery is possible, so that a miner who has suffered from it may be found in a condition in which he is quite fit to resume his work. Such is the case now before us. We are informed that the arbiter has found it to be proved by the evidence of the medical witnesses both for the appellant and the respondents that the appellant has now "completely recovered from this attack of nystagmus," and that "no one could now detect that he has ever suffered from nystagmus," and that "he has good sight." In ordinary circumstances such findings would be conclusive against the appellant. The employer, in applying for an ending of the compensation, discharges the *onus* resting upon him by bringing evidence to the satisfaction of the arbiter that there has been complete recovery from the attack, just as he would discharge the *onus* in a case of injury by accident if he proved complete restoration to present health and strength. The proof of being well and fit for work is all he is called on to establish.

On the other hand it is true that although a man may be able for his work he may in certain circumstances be entitled to resist the ending of the compensation if there is a proved liability to recurrence of evil consequences of the original injury; in short, that recovery though complete at the present time as regards present health and capacity, may not be complete as regards probable emerging consequences, causing breakdown of existing capacity, such breakdown being directly associated with the original evil, as effect with cause.

But if such a case for not ending the compensation is to be made out, it rests with the workman to make it good; the burden of proof of such a case rests upon him. He cannot call upon the employer to prove a negative, viz., to prove that if he gets another attack of the disease it will not be a result of the previous attack. If the workman who is proved to have recovered his capacity is not as a consequence to have the door closed on him, it is he who must take action to keep it open. He must show cause by proof that he is entitled to have it kept open, In this case can it be said that the appellant has brought such proof? I do not think it can. What is found is not fact, but rather that fact is unascertainable. It is true that the medical opinion on both sides is to the effect that it would be unwise for the appellant to resume work underground, because he might again be attacked by nystagmus. But this, which is of course only opinion of what may be, is not based on any distinct ground. On the one hand it is suggested that the man has a constitutional predisposition to this particular disease; on the other that the attack left the sufferer in a condition of susceptibility which might lead to another attack. But the arbiter felt himself quite unable to give a finding of fact one way or the other; he merely found that the evidence was entirely in the region of opinion, and was inconclusive; and therefore he held that the appellant had not discharged the burden of proof which rested on him.

This being so the arbiter has ended the compensation. I am of opinion that his decision was right, and that no other course was open to him. I consider that the present case is *a fortiori* of the case of *M'Ghee*, 1911 S.C. 870. There a development of evil had taken place for the second time, but as it was not possible to prove in fact that the new development was a result of the original accident, the workman was held not entitled to succeed. It is also

important to notice that in the case of *Jones* (1912, 1 Gordon W.C.C. 281) the workman, who had suffered from an attack of the same disease as the workman in this case, and who had recovered, but was found susceptible to a recurrence of the disease, failed in his application for an award of compensation because he did not prove that his susceptibility was due to the original attack.

The whole matter turns on what is to be proved and who is to prove it. A tendency to a recurrence of evil may be incapacity under the Act, but unless the workman can prove that such tendency is connected with the original evil condition produced by the accident—as in this case by the attack of nystagmus—the employer cannot be called on to pay any further compensation. Should it happen that a miner in the position of the appellant returns to work, and that he has another attack of nystagmus, he would of course have his claim for an award, as for a new injury producing incapacity, against the employer in whose employment he may then be, just as a workman who has recovered from an accident can have a claim for compensation if he has the misfortune to meet with another injury when at work.

LORD DUNDAS—This case raises purely a question of *onus probandi*. It arises out of an application by the employers to have a weekly payment of compensation to the appellant—a miner named Darroll—ended or diminished, in respect that his incapacity has entirely ceased, or at least become greatly lessened. The essential facts are few and simple. Darroll having been duly certified as suffering from miner's nystagmus as from 3rd September 1910, was paid full compensation at the rate of 13s. 10d. per week down to 27th October 1911. On this latter date, in proceedings for review instituted by the employers, the compensation was reduced to 8s. 10d. per week, on the ground that Darroll was fit for surface work of a limited character. As the result of the proof in the present application the learned arbiter found—"(3) The medical witnesses for both parties concurred in stating that Darroll has now completely recovered from this attack of nystagmus. No one could now detect that he has ever suffered from nystagmus, and he has good sight." Counsel for the employers contended, and I think rightly, that the primary *onus* incumbent upon them as applicants is sufficiently discharged by this finding of the man's complete recovery from the attack which had incapacitated him. But the point of the case is raised by the arbiter's fourth finding, which bears that "the medical witnesses on both sides also agreed in thinking that it would be unwise for Darroll to resume work underground because of the danger of a second attack of nystagmus, but the evidence was inconclusive as to the cause of this liability to recur." It is further explained in the finding that the evidence, which was inconclusive and entirely in the region of opinion, left it open whether the liability to recurrence of nystagmus was due to a constitutional predisposition or to a susceptibility to subsequent attacks left by the first attack. The appellant's counsel urged that it was for the employers to prove that the liability to recurrence of nystagmus was not due to the previous attack, and that as they had failed to do so the compensation could not be ended. I think this contention is wrong. It seems to me that when the employers have proved the man's complete recovery from the original attack of nystagmus the *onus probandi* shifts to the workman to prove, if he can, that any liability to a second attack which may exist is a direct consequence of the first. This view appears to me to be in accordance with reason and good sense, and I think it is supported by authority. In *M'Ghee* v. *Summerlee Iron Co., Ltd.* (1911 S.C. 870) the employers sought to have the compensation reviewed and ended, and they discharged their primary *onus probandi* by producing the certificate of a medical referee, conclusive as at its date, that the man was then fit to work as a miner. The workman pleaded that he had, since the date of the certificate, again become incapacitated, and was, and would be for the future, unfit for his work. The arbiter made a remit to a medical referee, who reported that M'Ghee was again incapacitated and unfit for his former work as a miner; that he was fit for work on the surface; and that the reporter could not say whether M'Ghee's present incapacity was the result of his accident. The arbiter held that the *onus* lay on the workman to prove that the supervening incapacity was due to the accident, and that he had failed to do so, and ended the compensation. The Court upheld the arbiter's decision on the ground that the employers having by the medical referee's certificate established the man's recovery (as the employers here have done, looking to the terms of the third finding), the *onus* fell upon the workman to prove that the supervening incapacity was due to the accident, just as in an original application he must show that his incapacity is due to an accident arising out of and in the course of his employment. An earlier case (*M'Callum* v. *Quinn*, 1909 S.C. 227), where the facts were peculiar and rather complicated, was distinguished. The employers were unsuccessful in their application for review, because, as the rubric bears, they had failed to prove that the workman had recovered from his injuries. That that was the proper and sufficient ground of judgment in *Quinn's* case appears clearly from Lord M'Laren's opinion; but I must frankly say that my own brief observations in the case seem to have been erroneously expressed. A decision bearing even more closely upon the point than *M'Ghee's* case is to be found in *Jones* v. *New Brynmally Colliery Co.* (1912, 106 L.T. 24; 1 Gordon's W. Comp. Rep. 281). A workman who had suffered from miner's nystagmus had recovered, but was unable to resume his old employment by reason of his liability to recurrence of the disease. The County Court Judge awarded

compensation, but the Court of Appeal held that, in the absence of evidence that the liability to such recurrence was due to the previous attack, the award of compensation could not be sustained. Cozens Hardy, M.R., observed—"There was no evidence that the workman was rendered by reason of the past nystagmus liable to a recurrence of nystagmus. And unless that can be made out it seems to me that the applicant must fail." Buckley, L.J., said that the County Court Judge "found that the workman was now quite well, although if he resumed occupation underground he would not continue to be quite well. But he does not find—which I think is the critical fact to be found—that if the workman went back underground the recurrence would be attributable to the previous attack of nystagmus. In the absence of any evidence to that effect—and I find none—I think that the claim for compensation in the present case cannot be sustained." It seems to me that this English case was rightly decided, and that it is in no material way distinguishable from that now before us. Still more recently, in *Garnant Anthracite Collieries, Ltd.* v. *Rees* (1912, 1 Gordon W. Comp. Rep. 396) the opinions expressed in *Jones'* case were approved by the Court of Appeal, though their decision went in favour of the workman, because the County Court Judge had found that the effects of the attack of nystagmus had not in fact disappeared, and that the man's subsequent susceptibility to further attack was therefore attributable to the first. I think we are not here at all in the region of cases like *Duris* (1912 S.C. (H.L.) 74), which the appellant's counsel pressed upon our attention. The appellant is not in my judgment entitled to plead that his sphere of employment is restricted by his susceptibility to a recurrence of nystagmus, for the simple reason that he is unable to connect that susceptibility, as effect with cause, with his original attack. On the grounds now stated I agree with the reasoning and the conclusions which are thus expressed by the learned arbiter in the case before us—"I held that the *onus* was on the appellant to prove that his present susceptibility to a recurrence of nystagmus is due to the attack of September 1910, from which he has now recovered. As he had failed to discharge this *onus*, and had completely recovered from the first attack, I ended his compensation." The two questions put to us should, in my opinion, be answered in the affirmative.

I ought perhaps to add a few words in regard to a topic mooted, but not exhaustively argued, during the discussion at our Bar. Miner's nystagmus, though not among the industrial diseases specified in the Third Schedule to the Act of 1906, has been brought within the scope of the Act by the statutory rules and orders of 1907. The point mooted was whether or not such an industrial disease is precisely equivalent to a personal injury by accident, so that the whole statutory consequences must be held to follow as much in the one case as in the other. The question might open a large field. It seems already to have been the subject of divergent judicial opinions (see *Jones, cit.*). It may come up sharply hereafter for decision, and it is unnecessary in the present case to decide it. In these circumstances I desire to reserve my opinion upon the matter.

LORD SALVESEN—I concur.

LORD GUTHRIE was absent.

The Court answered the questions of law in the affirmative and affirmed the dismissal of the claim by the arbitrator.

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

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

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*Tuesday, December* 10.

## FIRST DIVISION.

## GLASGOW SCHOOL BOARD *v.* ALLAN.

*School—Powers of School Board—"Medical Examination and Supervision"—Treatment—Education (Scotland) Act* 1908 (8 *Edw. VII, cap.* 63), *secs.* 4, 6, 17 (6).

The Education (Scotland) Act 1908, section 4, confers power on School Boards to provide for the "medical examination and supervision of the pupils." *Held* that they were not thereby empowered to provide and pay out of the school rates for medical or dental treatment.

The Education (Scotland) Act 1908 (8 Edw. VII, cap. 63), section 4, enacts—"A school board may, and where required by the Department shall, provide for the medical examination and supervision of the pupils attending schools within their district to such extent and subject to such requirements as may from time to time be prescribed by any code or minute of the Department, and, for the purposes of this section, the school board may employ medical officers or nurses, or arrange with voluntary agencies for the supply of nurses, and provide appliances or other requisites."

On 5th November 1912 the School Board of Glasgow (*first parties*) and Miss E. S. Allan, 1 Doune Quadrant, Kelvinside, Glasgow, testamentary trustee of the late James Allan, ironfounder, Glasgow, as such trustee and as an individual (*second party*), brought a Special Case to determine whether the first parties were entitled to provide and pay out of the school fund for the medical or dental treatment of pupils attending their schools.

The Case stated—"1. The parties of the first part are the School Board of Glasgow. The party of the second part, as trustee foresaid and also as an individual, is a ratepayer liable to contribute to the