rest we think the safer and better course will be to remit the case back to the Lord Ordinary for a proof before answer. [*His Lordship then stated that an amendment of the record proposed by the pursuer would be allowed, and continued*]—It only occurs to me to make one other remark, and it is this—that the case affords an instance of a very unfortunate state of affairs which sometimes results in our practice. I mean that if the Lord Ordinary had thought fit to allow an issue or to allow a proof, the case might have been reclaimed in six days and disposed of in all probability in the summar roll within a very short period of time. But the Lord Ordinary having taken the other view, the case was sent to the short roll in ordinary course, and has been depending since the middle of February last, and now, inasmuch as a proof is to be taken, the ten or eleven months which have elapsed have been wasted. For my part I cannot help thinking that if when a case like this appears in the Single Bills the circumstances were explained, the Court would probably send the case to the summar roll, or at all events secure for it the early hearing which would have naturally followed had the Lord Ordinary taken an opposite view from that which he took. There is, so far as I know, nothing to prevent the course I have suggested being adopted.

LORD MACKENZIE—I entirely agree. In regard to the observations just made by your Lordship I think this is a case of peculiar hardship to the defender. We are bound at this stage of the case to assume that he is innocent of the charge which has been made against him. He says he is, and yet for a period of eleven months nothing has been done in his case. I cannot help thinking that if there is any rule of practice which would prevent a case of this kind from getting an early hearing the sooner that rule of practice is altered the better.

LORD CULLEN—I concur in thinking that the reclaiming note should be disposed of in the manner which your Lordships propose.

The Court recalled the interlocutor of the Lord Ordinary and remitted the case back to him for a proof before answer.

Counsel for the Pursuer (Reclaimer)—Watt, K.C. — Dallas. Agents — Forbes, Dallas, & Company, W.S.

Counsel for the Defender (Respondent)—The Solicitor-General (Morison, K.C.)—Paton. Agents—Inglis, Orr, & Bruce, W.S.

Friday, January 8.

FIRST DIVISION.

[Sheriff Court at Hamilton.

GLANCY *v.* JOHN WATSON LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (2)—*Industrial Disease—Presumption—"Deemed to have been Due to the Nature of that Employment."*

The Workmen's Compensation Act 1906, section 8 (2), enacts—"If the workman, at or immediately before the date of the disablement or suspension, 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."

Observations per Lord Skerrington on the meaning and effect of the above section of the Workmen's Compensation Act 1906. *Cf. M'Taggart* v. *William Barr & Sons, Limited*, December 15, 1914, 52 S.L.R. 125.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 8 (2), is *quoted supra in the rubric.*

John Glancy, 7 Eddlewood Buildings, Hamilton, *appellant*, presented an application in the Sheriff Court at Hamilton for an arbitration under the Workmen's Compensation Act 1906 to recover compensation from Messrs John Watson Limited, coalmasters, Neilsland Colliery, Hamilton, *respondents*, in respect of miner's nystagmus contracted by him while in the respondents' employment at Neilsland Colliery.

On 16th October 1914 the Sheriff-Substitute (HAY SHENNAN) refused compensation, and at the request of the appellant stated a case for the opinion of the Court of Session.

The Case, *inter alia*, stated—". . . The following *facts* were admitted or proved—1. On 23rd September 1913 the appellant was injured in his own house through a detonator exploding in the coal in his fire. He received injuries in his eyes and sustained a nervous shock. He was then in the respondent's employment as a miner, and the coal had been supplied by them. . . . 3. By 1st November 1913 both eyes were quiescent and there was no ground for fearing further mischief so far as the direct injuries were concerned. But he was found at that date to be suffering from miner's nystagmus. 4. For some months prior to July 1913 the appellant had suffered from unsteadiness of his eyes in the course of his work, but he was not incapacitated for work, and he did not know until 1st November 1913 that this complaint was miner's nystagmus. 5. The nervous disturbance

due to the explosion of 23rd September was calculated to aggravate the incipient nystagmus from which appellant had been suffering. 6. The appellant claimed damages from the respondents for the injuries caused by the explosion. . . . . . 9. . . A settlement of appellant's claim was made on 23rd December 1913 for £60, and he granted a receipt 'in full discharge and settlement of all claims, present or future, competent to me in respect of injuries received on 23rd September last as the result of an explosion at my house, 7 Eddlewood Rows, Hamilton.' 10. The appellant resumed work as a miner on 13th January 1914 (three weeks after this settlement), and continued at work down to 18th May 1914. He then had to give up work on account of his eyes, and he was duly certified by Dr Crawford as having been disabled from miner's nystagmus since 19th May 1914, and he is not yet fit for work. . . . 12. Apart from the nystagmus the appellant was fit for work by 1st November 1913. 13. As the nystagmus was plainly visible on 18th December 1913 the appellant could not have completely recovered from it on 13th January 1914 when he resumed work.

"I held that the attack of nystagmus which disabled the appellant on 18th May 1914 was the attack from which he suffered on 23rd December 1913 and from which he had never completely recovered. Therefore I was of opinion that the appellant's claim was one of the claims which he discharged for the lump sum of £60, and that a claim founded on the aggravation of the incipient nystagmus by the explosion was just such a claim as the receipt of 23rd December 1914 covers, and was clearly an important part of the consideration for which the £60 was paid."

The case is not reported on the merits, but in the course of his opinion Lord Skerrington made the following observations on the meaning and effect of the presumption established by section 8 (2) of the Workmen's Compensation Act 1906, which should be read in conjunction with his Lordship's opinion in the case of *M'Taggart* v. *William Barr & Sons, Limited*, December 15, 1914, 52 S.L.R. 125.

LORD SKERRINGTON— . . . The result, in my view, is that the questions of law must be answered as suggested by your Lordships, and that the case must be remitted to the arbitrator for further procedure. As the appellant was employed immediately before his disablement in the process of mining, and as this process and also the disease known as miner's nystagmus are specified in the second and first columns respectively of the Order of 30th July 1913, it follows from section 8, sub-section (2), that the miner's nystagmus which caused the disablement must "be deemed to have been due to the nature of that employment unless the employer proves the contrary." It may then become necessary for the arbitrator to consider and decide a question of law to which I referred in my opinion in the case of *M'Taggart* v. *William Barr & Sons, Limited*, viz., what is the exact meaning and effect of the presumption established by sub-section (2) of section 8? I express no definite opinion on this point, because it has not been argued before us; but I think it right to state my present impression in order that a matter of great practical importance may be duly considered at the proper time. Sub-section (2) does not say that the workman shall be deemed to have contracted the disease either wholly or partially while in the employment of the last person who employed him in the scheduled process, nor does it say that the workman shall be deemed to have contracted the disease either wholly or partially while employed in the scheduled process within the period of twelve months previous to the date of his disablement. The presumption as I read sub-section (2) is that the miner's nystagmus which caused the disablement was due to the nature of the scheduled employment—in this case mining—irrespective of the date or place at which the disease was contracted. But the employer may rebut this presumption if he is able to do so. Now the arbitrator has already made a finding in fact which so far as it goes is in favour of the respondents, viz., that one of the causes which contributed to the miner's nystagmus from which the appellant is disabled was the accident of 23rd September 1913, which had nothing to do with the process or employment of mining. Accordingly what the respondents must further do in order to rebut the statutory presumption is to show (*a*) that the "incipient" miner's nystagmus from which the appellant suffered for some months prior to July 1913 and down to 23rd September 1913 was entirely due to some cause other than mining, *e.g.*, his having worked at some other industry or his having suffered from some accident or some disease unconnected with mining, and (*b*) that the work done by the appellant as a miner between 13th January and 19th May 1914 did not aggravate the diseased condition of his eyes which existed at the earlier date, and so did not contribute to the disease by which he was disabled at the later date. If the respondents make good both of these points, then the case will not fall within sub-section (1) of section 8, because it will have been proved that the disease which caused the disablement was not due to the nature of an employment, viz., mining, in which the appellant was employed within the twelve months previous to the disablement. Accordingly the appellant will not be entitled to compensation under section 8. On the other hand, if the respondents fail to establish either the one or the other of these propositions the presumption will hold good to the effect that mining was the cause, or at least one of the contributory causes, of the disease by which the appellant was disabled. The case will accordingly fall within the express language of sub-section (1) of section 8, seeing that the appellant was employed as a miner within the twelve months previous to the date of the disablement. It follows that the respondents as the persons who last employed the appellant as a miner will be bound to pay him compensation

unless they can prove facts which entitle them to total exemption in terms of proviso i or proviso ii of head (*c*) of sub-section (1), or to contribution in terms of proviso iii.

The Court holding that the appellant was not barred by the discharge recalled *hoc statu* the arbitrator's determination and remitted to him to proceed.

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

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

Friday, January 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

CREIGHTON *v.* WYLIE & LOCHHEAD, LIMITED.

Process — Appeal — Competency — Printing and Boxing—Reponing against Failure to Deposit Print Timeously—Motion not Made Timeously—Power of Court to Dispense with Observance of Act of Sederunt —Codifying Act of Sederunt 1913, *D III,* 2 *and* 3.

In an appeal from the Sheriff Court the appellant failed to deposit the print with the Clerk of Court within fourteen days after the process had been received by him, as required by the C.A.S. 1913, D III, 2. The appellant moved the Court to repone her in terms of the C.A.S. 1913, D III, 3, on the ground that the failure to deposit the print was due to an oversight. The motion was not made within the eight days prescribed by C.A.S. 1913, D III, 3. The Court *refused* the motion—on the ground, *per* the Lord President, that the Court could not dispense with the observation of the provisions of the Act of Sederunt, and even if it could no cause had been shown; *per* Lords Johnston and Skerrington that the appellant was entitled to no indulgence from the Court supposing the Court had power.

Observations per Lord Johnston on the power of the Court to relax the rules prescribed by the Act of Sederunt.

Boyd, Gilmour, & Company v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84; *Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; and *Bennie* v. *Cross & Company*, March 8, 1904, 6 F. 538, 41 S.L.R. 381, *commented on per* the Lord President.

The Codifying Act of Sederunt 1913, D III, provides—"2. *Printing and Boxing During Vacation.*—The appellant shall, during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said Clerk a print of the note of appeal, record, interlocutors, and proof, if any, . . . and the appellant shall, upon the box day or sederunt day next following the deposit of such print with the Clerk, box copies of the same to the Court; . . . and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court as aforesaid a print of the papers required . . . or to box . . . the same as aforesaid on the box day or sederunt day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except on being reponed, as hereinafter provided. 3. *Reponing.*—It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session, or the Lord Ordinary officiating on the Bills during vacation, to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court or the Lord Ordinary except upon cause shown, and upon such conditions as to printing, and payment of expenses to the respondent, or otherwise, as to the Court or the Lord Ordinary shall seem just."

Mrs Ellen Creighton, *pursuer*, brought an action against Wylie & Lochhead, Limited, *defenders*, in the Sheriff Court at Glasgow for £250 as damages for personal injury sustained by her through the alleged fault of the defenders. On 4th December 1914 the Sheriff-Substitute (A. S. D. THOMSON) allowed a proof. On 9th December 1914 the pursuer required the cause to be remitted to the First Division of the Court of Session, and on 12th December 1914 the process was received by the Clerk of Court. The print of the note of appeal, record, and interlocutors was deposited with the Clerk of Court, and the prints were boxed, on 31st December 1914. The print, in terms of the Act of Sederunt, should have been deposited with the Clerk of Court on or before 26th December 1914. 31st December 1914 was the box day next following the 26th December 1914, and 5th January 1915 was the first sederunt day thereafter.

In Single Bills on 5th January 1915 counsel for the pursuer moved the Court to repone the pursuer on the ground that the failure to deposit the print with the Clerk on or before 26th December 1914 was due to an oversight.

The defenders opposed the motion, and argued—The motion to repone was too late. It should have been made before the Lord Ordinary on the Bills within eight days from 26th December 1914—C.A.S. 1913, D III, 3. This was the tenth day. The Court had no power to dispense with the observance of the provisions of the Act of Sederunt—*Taylor* v. *Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1, and *Bennie* v. *Cross & Company*, March 8, 1904 6 F. 538, 41 S.L.R. 381, overruling *Boyd, Gilmour, & Company* v. *Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84. In any event no cause had been shown why the pursuer should be reponed.

At advising—

LORD PRESIDENT—An objection which I consider to be well founded has been taken to the competency of this appeal on the