Saturday, February 8.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

O'NEILL *v.* JOHN BROWN & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Review of Weekly Payment—Refusal of Workman to Submit to Surgical Operation.*

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator found that a workman who was "well and strong," but had been incapacitated by an injury, refused to undergo a surgical operation to restore his capacity; that he would have been willing to undergo the operation but for the advice of two of his own doctors, who disadvised it on the ground that "it would not lessen his incapacity in any way," but they as well as three doctors who examined him on behalf of his employers were all agreed that the operation was "an exceedingly simple one, and attended by no appreciable risk or danger to an ordinary healthy person"; and that it was "reasonably certain" that the operation would restore his capacity.

Held that on the facts stated the arbitrator was entitled to find that the workman's refusal was the cause of his continued incapacity, and he was not entitled to refuse, and it precluded him from the right to further compensation.

John O'Neill, labourer, Yoker, *appellant*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (MACDIARMID) at Dumbarton, whereby in an application at the instance of John Brown & Company, Limited, shipbuilders, Clydebank, *respondents*, the compensation payable by them to him was reduced to one penny per week.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the respondents, by minute of review lodged on 28th August 1912, craved the Court to review and end a weekly payment of 14s. 6d. to which the appellant was entitled under an agreement entered into between appellant and respondents—a memorandum of which was recorded in the books of the Court on 16th June 1911—in respect that the appellant refused to undergo a simple operation which would bring his incapacity to an end or at least greatly lessen the same.

"On 10th September 1912 the appellant lodged a note of defence in which he set forth that acting on the advice of his doctors he refused to undergo the said operation, and pleaded that in the whole circumstances his refusal was reasonable.

"On 31st October proof was led before me, when the following *facts* were established:—1. That on 22nd December 1910 the appellant, who is a labourer, was injured by accident arising out of and in the course of his employment with the respondents. 2. That said accident was caused by a steel plate falling upon the appellant's left foot. 3. That as a result of his injuries the appellant was totally incapacitated. 4. That the respondents agreed to pay him compensation at the rate of 14s. 6d. per week, being 50 per cent. of his average weekly earnings at the date of the accident, and that a memorandum of said agreement was recorded in the books of this Court on 16th June 1911. 5. That the appellant was still totally incapacitated, and that the respondents were still paying him compensation at the aforesaid rate. 6. That as a result of the said accident it was found necessary to have the second and third toes of the appellant's left foot partially amputated, and that this was done in the Western Infirmary, Glasgow, in January 1911. 7. That the mutilated stumps of the said second and third toes were tightly wedged in a scar of rigid unhealthy skin binding the first and third toes together, with the result that the appellant was unable to use the said foot without pain. 8. That the appellant complained of pain both in the toes and in the arch of the foot. 9. That there was no objective sign of injury localised in the arch of the foot. 10. That the condition of the said toes was in itself sufficient to account for any pain the appellant felt in the arch of the foot. 11. That the appellant had been examined by three duly qualified medical men on behalf of the respondents. 12. That they advise that the removal of the said stumps would cure the pain in the foot and restore to the appellant his former wage-earning capacity. 13. That it was admitted by all the medical men in the case that the operation was an exceedingly simple one and attended by no appreciable risk or danger to an ordinary healthy person. 14. That the appellant was well and strong and would have been willing to undergo the said operation but for the advice of his doctors. 15. That the appellant had on his own behalf been examined by two duly qualified medical men, who advised him not to undergo the said operation as it would not lessen his incapacity in any way. 16. That it was reasonably certain that were the appellant to undergo the said operation the pain in his foot would be removed and his former wage-earning capacity restored to him.

"On these facts I found that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the proposed operation, and that he was not entitled so to refuse. I therefore (on the suggestion of the agent for the respondents), in order to keep matters open, reduced the compensation payable by the respondents to the appellant to 1d. per week, and found no expenses due to or by either party."

The *question of law* for the opinion of the Court was—"Whether the appellant by his refusal to undergo the said operation was precluded from insisting on pay-

ment of compensation in terms of the aforesaid memorandum of agreement?"

Argued for the appellant—The appellant was entitled to refuse to undergo the operation if his refusal was reasonable. The arbiter had found that the appellant was willing to undergo the operation but for the advice of his own doctors, and in such a case as the present, where the medical advice differed, it was not unreasonable to refuse to undergo it—*Tutton* v. *Owners of s.s. "Majestic,"* [1909] 2 K.B. 54, *per* Cozens-Hardy, M.R., at p. 57; *Sweeney* v. *Pumpherston Oil Company, Limited*, June 23, 1903, 5 F. 972, 40 S.L.R. 721; *Donnelly* v. *Baird & Company, Limited*, 1908 S.C. 536, *per* Lords Ardwall and Dundas at p. 544, 45 S.L.R. 394, at p. 398. In no case had the Court held that a workman was unreasonable in refusing to undergo an operation if the medical testimony was divided. It was only in such a case as *Paddington Borough Council* v. *Stack*, July 23, 1909, 2 B.W.C.C. 402, where a workman's own doctor agreed with the employer's doctors in advising an operation, that the Court would hold a refusal to be unreasonable.

Argued for the respondents—The appellant's incapacity was due not to the accident but to his refusal to undergo the operation, and the refusal was unreasonable. The arbiter had found that the operation was exceedingly simple and unattended with risk, and a workman was only entitled to refuse an operation if it involved danger to life or health, or extraordinary suffering—*Donnelly* v. *Baird & Company, Limited, cit. per* Lord M'Laren, 1908 S.C. at p. 541, 45 S.L.R. at p. 396; *Warncken* v. *R. Moreland & Son, Limited*, [1909] 1 K.B. 184. The arbiter had found further that the appellant's own doctors did not disadvise the operation on these grounds, but merely because they were of opinion that it would not lessen his incapacity. In *Tutton* v. *Owners of s.s. "Majestic," cit.*, the operation involved serious risk to life, since it necessitated opening the body. Moreover, the workmen's own doctors disadvised it for that reason. *Sweeney* v. *Pumpherston Oil Company, Limited, cit.*, was entirely different, because in that case an expert medical opinion justifying the workman's refusal was allowed to be produced and founded on at the hearing in the Court of Session.

LORD DUNDAS—In this case the employers asked the Court to end a weekly payment of 14s. 6d. to which the appellant was entitled under an agreement, of which a memorandum was recorded, in respect that the appellant has, they allege, refused to undergo a simple operation which would bring his incapacity to an end, or at least greatly lessen the same. The defence, expressed in a note lodged by the appellant, was that, acting on the advice of his doctors, he refused to undergo the operation, and he pleaded that in the whole circumstances his refusal was reasonable.

The material facts are few and simple. On 22nd December 1910 the appellant was injured by accident arising out of and in the course of his employment with the respondents. The injury was to his left foot, and he was totally incapacitated. An agreed-on rate of compensation was thereafter paid, and has been continued. As a result of the accident the appellant had to have the second and third toes partially amputated, and that was done in January 1911. It is found that he was examined by three duly qualified medical men on behalf of the respondents, and they advised that the removal of the stumps would cure the pain and restore to the appellant his former wage-earning capacity. The 13th finding is very important—"That it was admitted by all the medical men"—that is to say, the medical men on both sides—"that the operation was an exceedingly simple one, and attended by no appreciable risk or danger to an ordinary healthy person." It is further found that the appellant was well and strong, and would have been willing to undergo the operation but for the advice of his doctors; and that the appellant had on his own behalf been examined by two duly qualified medical men, who advised him not to undergo the operation, as it would not lessen his incapacity in any way. I pause for a moment to point out that the ground apparently upon which these two medical men were against the operation had nothing to do with the risk or pain involved, because they were of the body of medical men referred to who agreed that the operation was an exceedingly simple one, with no appreciable risk or danger, but their view was that it would not be of any use. It appears, therefore, that even if the operation failed to do good, it could scarcely, on these facts, do harm; the *status quo* would be restored. The Sheriff-Substitute goes on to find—"16. That it was reasonably certain that were the appellant to undergo the said operation the pain in his foot would be removed and his former wage-earning capacity restored to him." I take that to be a pronouncement by the Sheriff-Substitute upon the proof led, amounting to as confident a pronouncement as any judge could safely make upon medical testimony before him. The arbitrator's conclusion upon these facts is this—he finds that the incapacity was fairly to be ascribed to the appellant's refusal to undergo the proposed operation, and that he was not entitled so to refuse. Therefore, on the suggestion of the respondent's agent, in order to keep the matter open, he reduced the compensation to the traditional penny. We are now asked to decide whether the appellant by his refusal to undergo the operation is precluded from insisting on payment of compensation in terms of the aforesaid memorandum of agreement.

The problem therefore comes to be, Is the appellant's refusal to undergo this operation an unreasonable one? or it might be put, Is the appellant's incapacity really owing to his original accident, or to an unreasonable refusal on his part to

undergo the operation? Obviously, I think all cases of this sort fall to be determined upon their circumstances, each one upon its own individual circumstances; and, indeed, the necessary introduction of the word "reasonable" seems to make that very clear, because a refusal may be perfectly reasonable in one set of circumstances and perfectly unreasonable in another set of circumstances.

The case of *Sweeney* (5 F. 972) was, I think, a very peculiar one, and depended upon its own very peculiar circumstances, which were not at all like those here before us. It is enough to point out by way of distinction that the operation there in question is described as "an important minor operation"; and further, that the eminent professor, whose opinion carried weight with the Court, seems to have thought that the man was mending, and might have recovered without any operation at all. Then the case of *Tutton* ([1909] 2 K.B. 54) was referred to. That was a case where it is clear that the operation would have involved a very grave amount of risk to the patient, because, according to the evidence, which the Court believed, of his own doctor, he had either to face a very serious operation without an anæsthetic, or a very grave risk of succumbing under the influence of an anæsthetic. He was suffering from Bright's disease. I have no difficulty at all in agreeing with the good sense of the decision of the learned English judges in *Tutton's* case. It seems to me to throw very little light on the problem before us on the facts, but I must say I do not think it bears out the proposition asserted by Mr Sandeman and his learned junior, to the effect that if a man *in bona fide* refuses to undergo an operation upon the advice of a qualified medical practitioner, that must be taken as a complete answer to any suggestion that he is unreasonable in refusing to undergo it. I do not think that the cases, of which there are a good many, at all support the view that a mere difference of medical opinion upon a question of this sort can be held to import that the refusal to undergo an operation is reasonable. It seems to me that if any such doctrine were to be laid down this part of the Act would really become a dead letter, because in the wide world of medicine I should think it would almost always be possible to obtain a perfectly genuine though eccentric opinion from some qualified medical man to any effect that might be desired, within limits.

I have made these general observations because of the arguments that were submitted to us. But on the facts of this case I confess I have no doubt that we ought not to interfere with the decision of the learned arbitrator. We must remember that all the medical men agreed—so that there can be no question about it—that there was no appreciable risk or danger about this operation, and that the man is a strong and healthy man, and would have been quite willing to undergo it except for the advice of the two medical men who advised the contrary. As I said before, their advice to the contrary was not owing to any risk or danger, but merely because they took the more pessimistic view that no good was likely to come of the operation, although, as I have said, no material harm could come of it at the very worst. Then we have the finding of the Sheriff-Substitute, sitting as a judge upon all the views that he had before him, which affirms in as strong language as he could safely use the reasonable certainty that as the result of the operation the man's wage-earning capacity would be restored.

If one considers the combined effect of these facts, I cannot say that I think the conclusion which the learned arbitrator came to — that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the operation and that he was not entitled so to refuse—that is to say, that the refusal was unreasonable—was one which we are entitled to disturb. Indeed, if it were necessary to do so, I should be prepared to say that I think the arbitrator's decision was quite right. I am for answering the question put to us in the affirmative.

LORD SALVESEN — I concur. It must always be a question of the circumstances disclosed in the evidence whether a man who refuses to submit to an operation has acted reasonably in so refusing. The appellant contends that it is enough to demonstrate the reasonableness of his course that he has acted in accordance with the advice of one or more medical men who have examined him, and who have come to the conclusion (as the two medical men who examined the appellant on his behalf did) that the operation suggested would not lessen his incapacity. If that were the law the duty of an arbitrator would be a very simple one. He would only require to find in fact that one or more medical men, who had examined the workman on his own behalf, had advised that an operation should not be undergone, and therefore to find in law that the refusal to undergo the operation was not unreasonable. I should be very slow to affirm that as a general proposition.

If we do not take that view, then the circumstances here amply support the conclusion at which the Sheriff-Substitute has arrived, because his last finding in fact is that it was reasonably certain that were the appellant to undergo the said operation the pain in his foot would be removed and his former wage-earning capacity restored to him. I cannot as a matter of common sense come to any other conclusion than that a man acts unreasonably who in view of the reasonable certainty of the operation curing him, and that it is a simple one unattended by risk or serious suffering, declines to submit to that operation. Accordingly I am of opinion, not merely that there was evidence to support the conclusion at which the learned Sheriff-Substitute arrived, but also that it was the right conclusion.

LORD GUTHRIE — I am of the same opinion. I think this is a case where it is perhaps unfortunate that the learned arbitrator did not sit with a medical assessor. No doubt had the question been anticipated that would have been arranged, but we have the arbitrator's decision, if not strictly speaking his finding, to the effect that by the proposed operation two things would result — the pain in the appellant's foot would be removed and his former wage-earning capacity restored to him. I assume that the only possible cure of this man's foot is by the proposed operation.

Now the cases show that that is not conclusive. You may have all the doctors agreeing in the view that an operation would effect a cure, but there are certainly two exceptional cases in either of which the workman's refusal to undergo the operation which would effect the cure is held not to be unreasonable. In the first place, if a medical man on his behalf thinks, as apparently in *Sweeney's* case Professor Annandale did, that a cure could be effected without an operation, then the refusal to undergo the operation might not be unreasonable. In the second place, as appears from *Tutton's* case, if the cure can only be effected at the cost of substantial risk or substantial suffering, then again the workman's refusal is not considered unreasonable.

Here we have neither of these elements. Nobody says that there is any other way of restoring this man from total incapacity to complete recovery except by operation, and all the medical men agree that there is neither substantial risk nor prospect of substantial suffering. It seems to me that in ordinary life the appellant would be considered unreasonable by reasonable people, and accordingly the arbitrator's finding is justified when he says that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the proposed operation, and that he was not entitled so to refuse.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Sandeman, K.C.—Morton. Agents—Hume M'Gregor & Company, S.S.C.

Counsel for the Respondents—A. O. M. Mackenzie, K.C.—Macmillan, K.C.—Keith. Agents—Auld & Macdonald, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Sheriff Court at Hamilton.

KENNEDY *v.* WILLIAM DIXON, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I* (15)—*Certificate of Medical Referee—Ambiguity.*

An arbitrator under the Workmen's Compensation Act 1906 is entitled to send back to the medical referee for explanation a certificate which is ambiguous.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Schedule I (15) enacts—"The medical referee to whom the matter is referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment . . . and that certificate shall be conclusive evidence as to the matters so certified."

In an application for review of the compensation payable under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) by William Dixon, Limited, Holytown, *respondents*, to Charles Kennedy, miner, Wishaw, *appellant*, the Sheriff-Substitute at Hamilton (HAY SHENNAN), acting as arbitrator, ended the compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"(1) The appellant, on or about 22nd December 1911, received injury to his right eye in the course of his employment as a miner with the respondents at their Carfin Colliery. (2) The defenders paid compensation to the appellant at the rate of ten shillings and one penny per week down to 12th August 1912. No question was raised in the present arbitration as to the compensation for the period between 12th August 1912 and 18th November 1912. (3) Parties lodged a joint minute upon 9th November 1912 in the following terms:—'In respect that the said Charles Kennedy, on or about 22nd December 1911, received an injury to his right eye while in the course of his employment with the defenders at their Carfin Colliery, and by agreement between the parties was paid compensation under the Workmen's Compensation Act 1906, and in respect the defenders now aver pursuer has so far recovered from his injury as to be fit for light work, which contention pursuer denies, and the parties being at variance and no agreement being likely to be arrived at: Therefore the said Charles Kennedy and the said William Dixon, Limited, crave the Court, in terms of section 15 of the First Schedule to the Workmen's Compensation Act 1906, to refer the matter to the medical referee, being an eye specialist, including in such reference the question whether any incapacity from which the said Charles Kennedy may now suffer is due to said accident.' (4) The reference was