Tuesday, November 10.

FIRST DIVISION.

[Sheriff Court at Airdrie.

DEVLIN *v.* CHAPEL COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I* (1) (*b*) *and* (3) — *Review of Weekly Payment—Unreasonable Conduct —Suspensory Order—Finding that Incapacity "due in whole or in part" to the Workman's Conduct.*

An injured miner claimed and received compensation from his employers for a certain period, after which the employers applied to the arbitrator to have the compensation ended or reduced. The arbitrator found that from a date prior to the application the workman's total incapacity had ceased, and that he had since been fit for light work but had made no attempt to obtain it. The arbitrator found further—"6. That the defender is still partially incapacitated for work; and 7. That said partial incapacity is due in whole or in part to the defender's failure to return to work when able to do so." Upon these findings he ended the payments of compensation until further order.

Held (*dub.* Lord Johnston) that the workman was entitled to an award of compensation in respect that the arbitrator had not found that his partial incapacity due to the accident had ceased.

Opinions per Lord Mackenzie and Lord Skerrington that unreasonable conduct on the part of a workman does not *per se* deprive him of his right to compensation.

Opinion per Lord Johnston that it would have been preferable to remit the case to the arbitrator for amendment and further statement.

Question per Lord Johnston whether a suspensory order might not be competent when unreasonable conduct on the part of the workman had prevented the determination of the question whether or not his incapacity due to the accident had ceased.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between the Chapel Coal Company, Limited, Airdrie, *respondents*, and Francis Devlin, brusher, Airdrie, *appellant*, the Sheriff-Substitute (LEE) reduced the weekly payments of compensation by the pursuers to the defender as from 30th March 1914 to 19s. weekly, and from 20th May 1914 ended the said weekly payments until further order. A Case was stated for appeal.

The Case stated, *inter alia*—"The following *facts* were admitted or proved—1. That on 24th October 1913 the defender sustained an injury to his back by an accident arising out of and in the course of his employment as a brusher with the pursuers. 2. That the defender's average weekly earnings in said employment were £3 weekly or thereby. 3. That the defender was paid compensation by the pursuers at the rate of £1 weekly from the date of said accident to 22nd May 1914. 4. That before 30th March 1914 the defender's total incapacity due to said accident had ceased, and that he was then fit for some light work. 5. That the defender has made no attempt to obtain work. 6. That the defender is still partially incapacitated for work; and 7. That said partial incapacity is due in whole or in part to the defender's failure to return to work when able to do so."

The *questions of law* were — "(1) The appellant being still admittedly incapacitated for his former work and unable to earn his former wages, this condition being due at least in part, if not wholly, to his own failure to engage in light work when able, was I right in ending his compensation until the further orders of Court? (2) In the circumstances stated was I entitled to end the appellant's compensation as at 28th May 1914 until the further orders of Court."

Argued for the appellant—Where there remained total or partial incapacity resulting from the injury, the arbitrator must award compensation—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I (1) (*b*) and (3). In an application to end or reduce compensation the *onus* was upon the applicant to establish either complete recovery or recovery of partial capacity — *M'Callum* v. *Quin*, 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. Here the *onus* had not been discharged. The arbitrator had failed to affirm that the workman's incapacity due to his injury had ceased — *Cory Brothers & Company, Limited* v *Hughes*, [1911] 2 K.B. 738. Unreasonable conduct on the part of the workman did not of itself bar him from maintaining his statutory rights. Where it had been intended by the Act that his unreasonable conduct should do so, it had been expressly so provided — Workmen's Compensation Act 1906 (*cited supra*), Schedule I (15). Where the workman had acted unreasonably, the question for the arbitrator still was whether the incapacity was due to the accident or to the unreasonable conduct. The *onus* was on the employer to establish that it was due to the latter—*Marshall* v. *Orient Steam Navigation Company, Limited*, [1910] 1 K.B. 79. The questions thus raised might be very difficult to determine, but they were not questions of great precision and the arbitrator must determine them — *Dunnigan* v. *Cavan & Lind*, 1911 S.C. 579, 48 S.L.R. 459. In the cases cited for the defender it had been either held or assumed that the workman's incapacity was, in fact, due to his own unreasonable conduct. The arbitrator in the present case had proceeded upon the workman's obstruction of proof, but if the workman obstructed proof the arbitrator might the more readily come to a finding upon *prima facie* evidence. There was here a total failure to establish a *novus actus* dis-

placing the accident as the cause of incapacity—*Dunnigan* v. *Cavan & Lind* (*cited supra*). Were it to be held, however, that a workman's unreasonable conduct barred his claim to compensation, there were in this case no findings to support the conclusion that the workman's conduct was unreasonable. There was no evidence that suitable employment was available—*Bryce & Company* v. *Connor*, December 6, 1904, 7 F. 193, 42 S.L.R. 154. The *onus* to establish the fact was on the employer—*Proctor & Sons* v. *Robinson*, [1911] 1 K.B. 1004. The questions of law should therefore be answered in the negative.

Argued for the respondents—It was conceded that the *onus* was as had been stated on the applicant. There was no appeal upon the arbitrator's reduction of compensation as from 30th March 1914. He might have proceeded by a further reduction as from 28th May. Instead he had suspended compensation, thus bidding the workman to go back to work experimentally. After an interval the arbitrator might make a new retrospective award. Suspensory orders, though not expressly authorised by the Act, had been held to be competent—*Taylor* v. *London & North-Western Railway Company*, [1912] A.C. 242; *Dempsey* v. *Caldwell & Company, Limited*, 1914 S.C. 28, 51 S.L.R. 16. Unreasonable action on the part of a workman had been held to be a ground for suspending or terminating compensation—*O'Neill* v. *J. Brown & Company, Limited*, 1913 S.C. 653, 50 S.L.R. 450; *Morgan* v. *W. Dixon, Limited*, 1912 S.C., H.L. 1, [1912] A.C. 74, 49 S.L.R. 45; *Warncken* v. *R. Morland & Son, Limited*, [1909] 1 K.B. 184; *Donnelly* v. *W. Baird & Company, Limited*, 1908 S.C. 536, 45 S.L.R. 394; *Higgs & Hill, Limited* v. *Unicume*, 1913, 6 Butterworth's W.C.C. p. 205; *Potts* v. *Guildford Syndicate, Limited*, Stone's Workmen's Compensation Reports, 1914, p. 330; *Bonsall* v. *Midland Colliery Owners' Mutual Indemnity Company, Limited*, Stone's Workmen's Compensation Reports, 1914, p. 331. In the present case the employers contended that the workman's incapacity was due to his own fault, but proof was impossible owing to the workman's unreasonable conduct. There was evidence before the arbitrator that suitable employment had been available. Counsel also cited *Keevans* v. *Mundy*, 1914 S.C. 525, 51 S.L.R. 462. The questions should be answered in the affirmative.

LORD PRESIDENT—On the 24th October 1913 the appellant sustained a personal injury by accident arising out of and in the course of his employment. The respondents, in whose service he was at the time, acknowledged liability and paid the workman compensation down to 22nd May 1914. Some time prior to that date they presented an application to the arbitrator asking him to find that total incapacity had ceased on the 10th March 1914 and to end the payments, or, alternatively, to reduce them. After inquiry the arbitrator found that total incapacity ceased by the 30th March 1914, and partial incapacity continued until 28th May 1914, and accordingly he reduced the payments for the period between these dates. And then as at the later period—28th May 1914—he ended the payment of compensation subject to the further orders of Court. The question we have to decide is whether the arbitrator was entitled so to do. I am of opinion that he was not, and for this very simple reason, that he had found in fact that at the 28th May 1914 incapacity still continued, due in part to the accident although in part to the man's own conduct; for I cannot otherwise read the sixth and seventh findings in the case, which run as follows—"That the defender is still partially incapacitated for work; and that said partial incapacity is due in whole or in part to the defender's failure to return to work when able to do so."

These findings, in my opinion, can bear only one meaning, namely, that the partial incapacity from which the man was suffering was due in part to the accident which had befallen him. The respondents, however, although this is undeniably so, contended that the payments of compensation ought to take end meantime, at all events in respect that the workman had, as was found in the case, failed to endeavour to obtain suitable employment. To which the simple answer is that the statute does not so prescribe. It affords no warrant whatever for depriving the workman of compensation merely because his incapacity is due in part to the accident and in part to his own conduct. It was not contended—nor could it well be—that the workman's conduct rendered it impossible for the arbitrator to perform his statutory duty. It was, however, contended that it made it difficult for him to do so. That I gravely doubt. For the assumption depends upon the belief that all workmen are transparently honest, which, though happily generally true, is unfortunately not universally true, and his endeavour to obtain work, and when obtained to do it, might only add to the difficulty of the situation. But it is sufficient for our judgment to say that the statute rears up no barrier against a workman obtaining compensation, if incapacity still exists, on account of his failure to endeavour to obtain suitable work. And I may add it rears up no barrier to the arbitrator reducing compensation to a very modest figure.

If in this case the arbitrator had found that but for the man's failure to attempt to obtain light work for which he was quite fit, his incapacity due to the accident would have ceased, that would have raised a totally different question. Such a finding I should have regarded as a finding that incapacity due to the accident had ceased and that present incapacity was due to the man's own conduct, an entirely new cause intervening. But that being confessedly not so in the present case, it being certain on the arbitrator's own findings that incapacity was due in part to the accident which befell the man on 24th October 1913,

it was, in my opinion, contrary to the statute for the arbitrator to end the payments altogether.

In giving this opinion I assume that the arbitrator intended to find that not only was the workman fit for light employment but that there was light employment available for him. We were informed by the respondents' counsel that evidence to that effect was before the arbitrator, and that it was by a mere oversight that he did not so find. I think it, however, unnecessary to remit, as we were invited to do, to the arbitrator to make a finding to that effect, inasmuch as, if made, it would not in the slightest degree alter the conclusion at which I have arrived, namely, that if incapacity due to the accident still exists, even though in part the incapacity be due to the workman's own conduct, that is not sufficient to deprive him of compensation under the Act.

I am therefore for answering both questions put to us in the negative.

LORD JOHNSTON — I should much have preferred that this case should be sent back to the Sheriff for amendment and further statement. As it stands, if your Lordships are decided to dispose of it as it stands, there can be but one, and that a negative, answer to the second query, because the learned Sheriff has failed to find essential facts which might have led to a different conclusion. The first query cannot, in my opinion, be answered yea or nay, because though we can probably infer the ground of judgment of the Sheriff, neither is the question which he wishes to raise made sufficiently specific, nor are the facts fully disclosed. But that does not prevent the answer to the second query, if there is to be no remit, being sufficient for the disposal of the case.

I think that it is apparent that the Sheriff in reaching his conclusion was moved by considerations which, whatever view of them the Court might take, deserve attention. I think that it would have been fairer to the Sheriff, and probably an aid to him and his brethren, had the case been sent back to him for re-statement. But if that is not to be done I must concur in the judgment which your Lordship proposes.

In doing so, however, I should like to explain what I understand to have troubled the Sheriff, as it equally troubles me. The facts here are—The workman was injured on 24th October 1913 and total incapacity ensued. Prior to 30th March 1914 his total incapacity had ceased, yet he was in receipt of full compensation until this application to reduce or end was brought. He was from 30th March 1914 fit for some light work. But he made no attempt to obtain such. It is to be inferred, though I think it should have been stated, that the cessation of total incapacity was the verdict of a medical referee under the First Schedule, art. 15, of the Act. If so, it should have been explained for what kind of employment the medical referee considered the workman fit. But the more important hiatus in the case is that the Sheriff does not tell us that such employment was available. And as the case stands, the want of a statement on this point is itself fatal to the judgment. Knowing Sheriff Lee as we do, I cannot assume that he had not information which satisfied him on this point, or that his failure to fill up the hiatus was anything but an inadvertence. Having made no attempt to work from 30th March to the date when the case came before the Sheriff, the workman remained partially incapacitated at the latter date. Now here again the Sheriff fails to supply us with essential facts, or to state clearly what was the ground of his judgment and the question which he really intended to bring before us.

I think that he has been led into the misadventure by adopting a faulty form of statement. The second query is sufficient to raise any competent question. The first query is really an attempt to state a ground of judgment interrogatively. What the Sheriff ought to have done was, after stating his facts, to have stated his grounds of judgment, and then his judgment, and the point to be raised would have been clear, and the answer to the second query as stated would have completely disposed of it. But the statement of fact is not sufficient to raise it.

The Sheriff's judgment was this—1st. As from 30th March to 28th May 1914 (the latter presumably being the date of the hearing of the case) he reduced the compensation from 20s. to 19s. merely, I imagine, to mark his sense that it ought not to have been paid in full; and 2nd, from 28th May 1914 he ended the compensation till further order.

I infer from query 1 that the Sheriff would have stated his ground of judgment thus—"The workman was *ex hypothesi* partially recovered at 30th March 1914. He could not go straight to his old work and old wages. It was his duty to get himself fit by commencing on lighter work, and by 28th May he might have been doing his old work, or other equally remunerative, and earning his old wages. I cannot say positively that he would, because he has obstinately refused to bring things to a test, and to provide me with the means of judging whether he is wholly recovered or of the degree of his recovery. He has therefore barred himself from founding on his continued partial incapacity."

I think that in this, if it be as I infer the ground of the Sheriff's judgment, there is a substantial question for consideration. But, then, further statements are lacking. The Sheriff could not have reached the point if he had not had medical evidence to the effect that what the workman wanted was a gradual bracing through work of some kind, and to the further effect that if he applied himself to such work there was reasonable probability that at the end of a period, more or less definite, he would be found to be entirely recovered. I infer that the Sheriff had evidence to the above effect. But it was necessary that he should so state and also formulate his ground of judgment and not leave both to inference.

What I gather to be in the Sheriff's mind

is this—It has been accepted that the workman's rights are purely statutory and have no foundation in common law, and it is contended that the system of compensation is wholly artificial and that equitable considerations are inadmissible, and accordingly that where total incapacity is established, it lies with the employer to prove, not only that he is entitled to review, but that on such review the compensation formerly awarded should be ended, or should be diminished, and if diminished, the extent of the reduction which should be allowed, as in the latter case the compensation "shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." It has been further contended—and for this there is support in many previous decisions—that the *onus* of bringing positive evidence of all the things essential to fixing the ending or diminution of compensation, including the amount, lies on the employer. In fact the result of some of the cases is not theoretically but practically pretty much this, that when dealing with an unwilling subject the employer must, to escape continuing liability for total incapacity, find and offer the man work. On the other hand, it is clear that many cases may occur in which justice between employer and workman requires that the plea of personal bar should be accepted. Can this be done under the statute? The plea has never been accepted *eo nomine*. But without venturing at present an opinion, I think that it is not impossible that it may be found to have been accepted in effect.

Take the case of the man who is advised that an operation is required, and that if he submits to it he will find himself in a few weeks or months restored to his old working and earning capacity. He refuses to put the matter to the test. What is to be the result? I think that it is quite recognised that if the refusal to submit to the operation is unreasonable, and the prospect of good results reasonably certain, the Sheriff is entitled to end the compensation. That is not proceeding on proof of anything definite. It is proceeding upon a chain of probabilities, and results in the affirmation of conduct which deprives the workman in one way or another of his statutory advantage. This may be accounted for by the shifting of the *onus* of proof or in other ways. But it cannot be regarded as anything other than the admission of equitable considerations, and it may well be that it is really the sustaining of a plea in bar. When we come to the present case we find it very analogous to though simpler than the former. The question of personal reasonableness is answered for us. A man who is pronounced at least so far recovered, and fit for light work, by the conclusive verdict of a medical referee, and who refuses to go to work, is *ipso facto* unreasonable. The question remains what is the Sheriff to do if the workman deprives him of the means of determining anything about his wage-earning capacity, and whether it is or would be entirely restored, or to what degree it is or would be partially restored, if he exerted himself. For the workman's failure is not a failure to obtain work but a failure to endeavour to obtain work. I think that the Sheriff is not improbably troubled with the sense that the judgment in some of the prior cases (regarding operations, for I do not think that a case in the present circumstances has yet come before the Court) lead to this, that he must find in fact upon evidence of opinion. A doctor—for the medical referee is not final on this point—can only certify that to the best of his opinion and belief the result of a gradual return to work will be full restoration. But the degree of assurance, in his opinion, differs with every individual doctor. In the same circumstances another may only go the length of predicating substantial improvement. In the first case the Sheriff is left to rely only upon opinion if he is to end compensation. In the second case he is left in the more unsatisfactory position of having to settle the degree of recovery on mixed opinion and speculation. What I think the Sheriff wishes to ask is the question, "May I more simply deal with the case on the principle of personal bar, on the footing that the medical referee has certified that the man is partially recovered already and fit for some work, without having to weigh in judicial scales medical opinion on this speculative question, viz., what will be the effect of a return to work?" I gather that he also means to ask whether such personal bar would legitimately result in ending or only in suspending compensation. If I have interpreted the Sheriff aright, either in whole or in part, that is, I think, a very reasonable attitude for him to take, and the question suggested one which might very properly be entertained.

LORD MACKENZIE—I concur with your Lordship in the chair. I think the case admits of solution on a simple ground. There may be arguable questions suggested rather than raised by the statement of facts in the case, but the ground upon which I proceed is this—The arbitrator has found by the sixth finding that the defender is still partially incapacitated for work. The conclusion he has reached is that the compensation should be totally ended. Now what is the ground upon which he proceeds in arriving at that conclusion? It is to be found in the seventh finding in fact, which is—"That said partial incapacity is due in whole or in part to the defender's failure to return to work when able to do so." Applying the canon of construction which is applicable to findings in fact as well as to the averments in a record, this finding must be construed at its weakest, and it therefore means this—that said partial incapacity is due in part to the defender's failure to return to work when able to do so.

It appears to me that, construing the

seventh finding in that way, it is a *non sequitur* to reach the conclusion which the arbitrator does and end the compensation altogether, because, according to authority, so long as it is possible to predicate that the injury is still in part due to the accident compensation cannot be totally ended. Upon this seventh finding it is impossible to say that the incapacity was not in part due to the accident, and therefore the course taken by the arbitrator appears to me to be unwarranted.

With reference to certain observations that have been made, it appears to me—although it is unnecessary to express an opinion upon the point in this case—that unreasonable conduct *per se* can never be sufficient to entitle an arbitrator to end compensation. He must go further and must be in a position, upon the medical evidence before him, to hold that the after consequences were due to the unreasonable conduct. I have been unable to find any warrant in the statute—which is our guide in the matter—for saying that the Court can forfeit the right which the statute gives a man to compensation because in their view his conduct is unreasonable. If his unreasonable conduct, upon the evidence, has led to the result that the injury which he still suffers from is no longer due to the accident, then the chain of causation is broken and the man is no longer entitled to compensation.

LORD SKERRINGTON—This is an application by an employer for the purpose of having a workman's compensation ended or alternatively reduced. The Sheriff arbitrator has pronounced an interlocutor ending the weekly payments as from 30th May 1914 until further order. I understand this judgment to mean that the workman (the appellant) is to receive no compensation in the meantime and *in hoc statu*, but that he is at liberty in the event of a change of circumstances to ask the arbitrator to award him compensation as from the date of such change. The arbitrator's findings in fact as set forth in the Stated Case show that he refused to hold it proved that all incapacity resulting from the accident had ceased as at 28th May 1914, the date of his interlocutor. On the contrary, he has in substance though not in form found that the appellant's present partial incapacity is due in part to the accident and in part to the appellant's "failure to return to work when able to do so." Although the arbitrator finds that before 30th March 1914 the appellant's "total incapacity had ceased and that he was then fit for some light work," he does not find that the appellant could have obtained light work if he had looked for it, but that he unreasonably failed to do so. Some such finding was essential if the arbitrator was to decide that the appellant's condition of partial incapacity as at 28th May 1914 was in part the result of his own unreasonable conduct and not of the accident sustained by him in the course of his employment with the respondents. The respondents' counsel practically conceded this point, but he maintained that evidence had been led which would have entitled the arbitrator to make such a finding, and he moved that the case be remitted in order that the arbitrator might make a finding upon the question whether the appellant could have obtained light work but unreasonably failed to do so. I have come to the conclusion that the motion should be refused on the ground that such a finding as I have indicated would not justify the result at which the arbitrator has arrived, viz., that the appellant's right to compensation should be suspended *in toto* in the meantime. Seeing that the appellant has been found to be still partially incapacitated as a result of the accident, he is entitled to some compensation, though in assessing the amount the arbitrator will keep in view the fact (if it be a fact) that the appellant's incapacity would have been less if he had acted reasonably and engaged in light work on or before 30th March 1914.

The respondents' counsel argued that if a workman unreasonably refuses to submit to or to use the appropriate means of restoring his health either by way of medical treatment or of light work, or of a surgical operation, he is precluded from claiming compensation so long as he persists in such unreasonable conduct. By such conduct, it was argued, a workman makes it impossible for an arbitrator to decide with certainty whether if such means had been used the incapacity would have been removed either in whole or in part, and if in part to what extent. Accordingly a workman ought not in equity to be allowed to enforce his rights under the Act until he chooses to submit to or to use the appropriate cure, and so provide his opponent and the arbitrator with the most satisfactory evidence on the question whether, and if so to what extent, the existing incapacity is the result of the injury within the meaning of Schedule I (1) (*b*) of the Workmen's Compensation Act 1906. There may or may not be equity in favour of this contention of the respondents' counsel, but no support is to be found for it in the statute and its schedules. Where it is intended that unreasonable or obstructive conduct on the part of a workman shall lead to a suspension of his right to compensation it is so provided in express terms (Schedule I (15)). Accordingly I respectfully adopt the view taken by the Court of Appeal in England in *Marshall* v. *Orient Steam Navigation Company, Limited*, 1910, 1 K.B. 79, to the effect that unreasonable conduct on the part of a workman does not *per se* deprive him of his right to compensation. It must further appear, as Fletcher-Moulton, L.J., observed, *ibid*, p. 81, that "the unreasonableness of the man broke the chain of causation"—in other words, that the continuing disability "was due to the man's own unreasonableness in refusing to undergo the operation," *ibid*, p. 85. It is true that there are several Scottish cases the decisions or dicta in which may be appealed to as supporting the view that unreasonable conduct may "preclude" or bar a workman from claiming compensation to which he is otherwise entitled. On examination, however, it will be found that some of these are really authorities to the opposite effect

and that the residuum of judicial authority in favour of this plea of bar is very meagre. In the earliest case, *Dowds* v. *Bennie & Son*, (1902) 5 F. 268, 40 S.L.R. 239, though the form of the question of law which the Court answered in the negative is open to criticism, Lord Adam, who delivered the opinion of the First Division, laid it down that the appellant's failure to use or submit to the proper means of recovery "did not exhaust the case, for the question remained as to how far the existing condition of the appellant's foot was to be attributed to his failure to use these means. The Court construed the arbitrator's finding as meaning that "had there been proper treatment the ankle would have been cured, and therefore that its present condition is entirely due to want of proper treatment." Accordingly the Court sustained the award by which the weekly payment was permanently brought to an end. The next case, *Anderson* v. *Baird & Company, Limited*, (1903) 5 F. 373, 40 S.L.R. 263, is, so far as I know, the only clear and direct authority for the proposition that unreasonable refusal on the part of a workman to submit to an operation "precludes" him *per se* from receiving compensation, but it should be noted that the opinion of Lord Adam in the case of *Dowds* was not cited. The Second Division recalled the decision of the arbitrator, assoilzieing the employers, and remitted to the arbitrator to allow the workman one penny per week until the further order of the Court. Lord Young dissented. In the case of *Sweeney* v. *Pumpherston Oil Company, Limited*, (1903) 5 F. 972, 40 S.L.R. 721, the First Division held that the workman had not acted unreasonably in refusing to submit to an operation, and was not therefore "precluded" from insisting on his application for compensation. Lord Kinnear in his opinion stated the law exactly as it was afterwards laid down in *Marshall's* case. He said—"If you can show that he is not suffering from an accident, but that he is suffering only in consequence of his own unreasonable conduct, he is not entitled to compensation, but I do not think that is shown in this case by the findings of the learned Sheriff." In *Donelly* v. *Baird & Company, Limited*, 1908 S.C. 536, 45 S.L.R. 394, the question put was whether "the appellant by his refusal to undergo the operations has forfeited his right to receive further compensation." A Court of Seven Judges — the Lord Justice-Clerk, Lord M'Laren, Lord Low, Lord Ardwall, and Lord Dundas, *diss.* Lord Stormonth-Darling and Lord Pearson—answered the question in the affirmative, but substituted the word "precluded" for the word "forfeited." The opinions of some of the majority support the view that unreasonable conduct *per se* is sufficient to bar a workman's right to receive compensation, but Lord Ardwall at any rate proceeded on the view that the arbitrator's finding must be construed as meaning that the appellant's existing incapacity resulted from his refusal to submit to the operations. The finding was that the continued incapacity was "fairly attributable to the want of such operations." Lord Ardwall's construction of this finding seems to me to be the correct one, though it would be better if arbitrators would state in plain language whether they do or do not find that the continued incapacity is wholly due to the workman's unreasonable conduct. I cannot regard the judgment in *Donelly's* case as a clear authority in favour of the respondents. In the latest case, *O'Neill* v. *John Brown & Company, Limited*, 1913 S.C. 653, 50 S.L.R. 450, the Second Division again affirmed that a workman "by his refusal to undergo an operation" was "precluded from insisting on payment of compensation." The compensation was reduced to one penny per week. The Court in this case sustained findings by the arbitrator to the effect that the workman had acted unreasonably—though he followed the advice of his own doctor. The arbitrator, however, further found that the appellant's present incapacity "was fairly to be ascribed to his refusal to undergo the proposed operation." This finding, though badly expressed, was equivalent in my view to a finding that the incapacity did not result from the injury by accident. Accordingly this case cannot be regarded as an authority in favour of the contention of the respondents' counsel.

After reading the statute and the decisions I can find no justification for the creation by the Court of a plea or defence not sanctioned by the statute. Further, the weight of authority in Scotland seems to me to be in favour of the view expressed by Lord Adam and Lord Kinnear in the passages which I have cited.

For these reasons I am of opinion that nothing would be gained by remitting the case to the arbitrator. He certainly could not be allowed to reconsider his opinion to the effect that the existing partial incapacity is in part due to the accident. It follows that the questions of law must be answered in the negative, and that the arbitrator must proceed to assess the compensation to which the appellant is entitled.

In the foregoing opinion I have assumed that a workman is proved to have acted unreasonably in refusing to take the proper means for regaining his health, and that his incapacity is held by the arbitrator to be entirely due to that cause. The result would, I think, be the same if he acted reasonably in so far as he followed the advice of his own doctor, but if the course of treatment so followed amounted to malpractice and was the cause of the incapacity. Unreasonable conduct on the part of a workman and bad treatment on the part of his medical man are both examples of a *nova causa* for the effects of which the employer would not be responsible. On the other hand, I should be slow to hold that an innocent error of diagnosis or treatment on the part of the workman's doctor would break the chain of causation.

The Court answered the questions of law in the negative.

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