

ing. Accordingly it is a possibility that some of the jurymen who heard them, if they paid attention to them and if they remembered them, may have formed from them a false impression. But the question of their effect must remain a speculative one.

It should be said that this case is the first of its kind. So far as I am aware it has never before been attempted to upset a verdict on the ground that it was vitiated by the arguments presented to the jury who pronounced it. The rhetorical javelins which opposing counsel employ sometimes overshoot the mark as we all know, and it can hardly be otherwise in the stress of debate. But while this is harmless in the case of an ordinary argument submitted on the merits, it is otherwise when the argument strays from the merits into topics which are not only irrelevant but illegitimate. The presiding judge can usually restrain or correct any such excess if such should occur. He was not asked to interfere in the present case, and the pursuer pointed out in the debate before us—with a certain amount of force—that the only effective counter to the suggestion carried by the words used would have been to disclose to the jury that that suggestion was inconsistent with the tender.

Now I think that if the incident founded on is to have the effect of upsetting the verdict it must be shown (on grounds supporting a reasonable conviction to that effect) that the presentation of the argument complained of prevented the trial from being a fair one. When it is kept in mind that in the present case there was no intention to mislead, that the words themselves are not unambiguous, and that their effect is at best speculative, I arrive at the conclusion that it would not be reasonable to treat the present case as being one in which a fair trial was prevented, or to grant the new trial which is asked for.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD HUNTER—I also agree with your Lordship that no ground has been made out for granting a new trial. As I was the Judge who presided at the trial I desire to make only one remark. When counsel for the defender made the reference to expenses I thought at the time it was unfortunate he should have done so. But it did not appear to me that it was so made or that the reference was couched in such words as to make it probable or even possible that it would endanger a fair determination by the jury. In those circumstances I did not think it was necessary for me to call attention to what had been said, and so far as the result reached by the jury is concerned, I do not think that anyone who was cognisant of all the facts in the case will say that the result was in any way contrary to the real justice of the case.

LORD MACKENZIE was not present.

The Court discharged the rule.

Counsel for Pursuer—Watt, K.C.—R. M. Mitchell. Agent—W. T. Forrester, Solicitor.

Counsel for Defender—Morton, K.C.—Scott. Agents—Alex. Campbell & Son, S.S.C.

Thursday, June 23.

## SECOND DIVISION.

[Lord Ashmore, Ordinary.]

### BENNETT v. SCOTTISH BOARD OF HEALTH.

*Insurance—National Health Insurance—“Medical Treatment”—Complaint by Panel Patient—Insolent and Abusive Language—Jurisdiction of Medical Service Sub-Committees, Insurance Committees, and Scottish Board of Health to Decide Question—National Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 15 (5)—National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, 45 (1) and 51.*

The National Health Insurance (Medical Benefit) Regulations (Scotland) 1913, issued in virtue of power conferred under the National Insurance Act 1911, section 15 (5), provide—Regulation 45 (1)—“Every [Insurance] Committee shall constitute a special sub-committee (in the Regulations referred to as the ‘Medical Service Sub-Committee’) for dealing with any question arising between a person entitled to obtain treatment from a practitioner on the panel and the practitioner attending him in respect of the treatment (including the granting of certificates) rendered by the practitioner or the conduct of the insured person while receiving that treatment, and every question so arising shall stand referred to that Sub-Committee, and the Committee may, if they think fit, refer to that Sub-Committee any other question arising with reference to the administration of medical benefit or to the discharge by the practitioner of his duties under his agreement with the Committee.” Regulation 51—“Where . . . any question arising between the Committee and the practitioner . . . is referred, or any appeal from a decision of the Committee is made, to the Commissioners . . . any decision of the Commissioners . . . shall be final and conclusive.”

A complaint that a panel practitioner in the course of his official duties had used insolent and abusive language to his patient and the members of the patient's household was heard and determined against the practitioner by the Medical Service Sub-Committee, and on appeal by the Insurance Committee and the Scottish Board of Health, to whom the duties of the Insurance Commissioners had been transferred. In an action of declarator by the practitioner that the decisions of these bodies were *ultra vires* in respect that they had no power to decide the question raised, held that the question had been compe-

tently decided, and that the decision of the Scottish Board of Health was final.

The National Insurance Act 1911 (1 and 2 Geo. V, cap. 55) enacts—Section 8 (1)—“Subject to the provisions of this Act, the benefits conferred by this part of this Act upon insured persons are—(a) Medical treatment and attendance. . . .” Section 15 (5)—“Every [Insurance] Committee shall also make provision for the supply of . . . drugs and medicines and prescribed appliances to insured persons in accordance with regulations made by the Insurance Commissioners. . . .”

The National Health Insurance (Medical Benefit) Regulations (Scotland) 1913 provide—Regulation 2—“‘Treatment’ means medical attendance and treatment.”

Regulations 45 (1) and 51 are quoted *supra* in rubric.

Simon H. Bennett, Doctor of Medicine, Glasgow, *pursuer*, brought an action against the Scottish Board of Health, the Insurance Committee for the Burgh of Glasgow, and the Medical Service Sub-Committee for the Burgh of Glasgow, *defenders*, in which he sought declarator that it was incompetent for the defenders, the Medical Service Sub-Committee, to entertain and decide any question arising between the pursuer as a panel practitioner and Colin Mackenzie, a panel patient, other than a question as to the administration of medical benefit, and in particular that it was incompetent for the Sub-Committee to entertain and decide the question whether the pursuer on a certain date used insolent or abusive language towards the panel patient or other members of his household, that it was in like manner incompetent for the Insurance Committee to approve of and confirm any such decision of the Sub-Committee, and that it was in like manner incompetent for the Scottish Board of Health, to whom the decision of the Insurance Committee had been appealed, to entertain and decide any such question. The action contained appropriate conclusions for reduction of the decisions given on the question by the three defenders.

The pursuer *pleaded, inter alia*—“1. On a sound construction of the National Insurance Acts 1911 to 1919 and Regulations thereunder it is incompetent and *ultra vires* of the said Medical Service Sub-Committee, the said Insurance Committee, and the Board of Health to entertain and decide questions arising between medical practitioners and their panel patients other than questions arising with reference to the administration of medical benefit, and the pursuer is therefore entitled to decree in terms of the declaratory conclusion of the summons. 2. The proceedings of the said defenders the Medical Service Sub-Committee, the Insurance Committee, and the Board of Health, complained of being *ultra vires* and in violation of the provisions of the said statutory regulations, are *funditus* null and void, and the pursuer is entitled to decree of reduction as concluded for.”

The defenders pleaded, *inter alia*—“1. The action being incompetent should be dismissed.”

The defenders, the Insurance Committee

and the Medical Service Sub-Committee for the Burgh of Glasgow also pleaded, *inter alia*—“2. The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons the action should be dismissed.”

The facts of the Case appear from the opinion of the Lord Ordinary (ASHMORE), who on 20th July 1920 dismissed the action.

*Opinion.*—“This is an action at the instance of a medical practitioner on the panel of the Insurance Committee for the Burgh of Glasgow, and is directed against the Medical Service Sub-Committee, the Insurance Committee for the Burgh of Glasgow, and the Scottish Board of Health.

“The object of the action is to obtain a judicial declarator that it was incompetent for these bodies to entertain and decide the question whether the pursuer on a specified occasion used insolent or abusive language towards one of his panel patients or the members of the patient's household; and there are ancillary conclusions for reduction of the decisions already given on the subject by the three bodies referred to.

“It appears from the pursuer's own averments that the question was entertained and dealt with by the Medical Service Sub-Committee under the following circumstances:—On the evening of 7th April 1919 the pursuer as panel practitioner received a message from his panel patient stating that he was unwell and asking the pursuer to visit him officially. The pursuer went to the patient's house the same night, and he admits that in the course of his visit on finding that the patient had become unwell about six o'clock in the morning he—the pursuer—‘reprimanded’ the patient for the delay which had occurred in notifying the pursuer.

“The pursuer avers that he did not use any violent or abusive language on that occasion. He explains, however, that on 19th April 1919 the patient lodged with the Clerk to the Insurance Committee a complaint in terms of the Medical Benefit Regulations to the effect that the pursuer on the occasion of his visit to the patient had used abusive language towards the members of the patient's household.

“The Sub-Committee, the Insurance Committee, and on appeal the Board of Health (acting by two nominated Commissioners) successively dealt with and decided the question raised by the patient's complaint.

“By section 51 of the Regulations the decision of the Commissioners is declared to be final and conclusive.

“For the pursuer it is contended that the Sub-Committee, the Insurance Committee, and the Board of Health all acted *ultra vires* in considering the complaint in so far as it related to the alleged behaviour of the pursuer towards the complainer and his household.

“The contention is based on the pursuer's interpretation of the scope of the jurisdiction conferred by the Regulations under which any question between a panel practitioner and his panel patient in respect of ‘the treatment’ rendered by the practitioner is referred for decision.

"The term 'treatment' as used in the Regulations is defined as meaning 'medical attendance and treatment.'

"Was the question raised by the patient's complaint a question in respect of the medical attendance and treatment rendered by the pursuer?"

"In my opinion it was. On the pursuer's own admissions the complaint raised a question with reference to what occurred on the occasion of the pursuer's official attendance and in the course of the discharge of his duties as the panel practitioner. I think that his attendance on that occasion was medical attendance within the meaning of the Regulations.

"Further, the complaint, as I think, raised the definite concrete question—'Is it consistent with proper or reasonable medical attendance and treatment of a patient in his home that the medical practitioner on his official visit should use abusive language to the patient and his household?'

"According to the argument for the pursuer the Regulations give no jurisdiction to deal with the personal relations of the panel practitioner with his panel patient, or the practitioner's personal manner or behaviour towards his patient.

"The argument so put seems to me to be too absolute and too sweeping. On the one hand I think that it is clear, for example, that the jurisdiction conferred by the Regulations would not cover questions as to the language or behaviour of a panel practitioner in the course of an ordinary conversation on the street. On the other hand I think that if the objectionable language is used or the bad behaviour occurs when the panel practitioner is visiting his patient officially, then if the language used is abusive or foul or obscene, or if the behaviour is violent or vicious as the result of drink or passion, I am of opinion that the jurisdiction does extend to such cases for the limited purposes of the Regulations.

"Now in the present case the complaint and the questions raised under it had to do only with the official relations between the panel practitioner and his panel patient, and were heard and determined only for the purpose of giving effect to the provisions of the Regulations.

"I think therefore that jurisdiction was competently exercised by the various defenders.

"I am further of opinion that the jurisdiction of this Court is effectually excluded by the decision of the Board of Health.

"There is no suggestion that the Board did not act in good faith, did not hear or give opportunity for hearing both parties, or did not act regularly or fairly towards them and between them. Their decision is therefore final.

"The opinion of Lord Chancellor Loreburn in the case of the *Board of Education v. Rice* in 1911 Appeal Cases, at p. 182, is apposite and appropriate in this case. I quote the following passages:—'Comparatively recent statutes,' said his Lordship, 'have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or

determining questions of various kinds. I need not add that they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. . . . The Board have of course no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise. The Board is in the nature of the arbitral tribunal, and a court of law has no jurisdiction to hear appeals from their determination either upon law or fact.'

"For the reasons which I have given I think that the pursuer's case must be dismissed as incompetent and irrelevant.

"I may add that on another ground it must fail. I refer to the agreement between the Insurance Committee and the pursuer, articles 2 (1) and 14 thereof.

"Under these provisions any question relating to the interpretation of the agreement (including the Regulations) is referred to the Commissioners. Now the question of interpretation has already been referred to them and has been decided by them. In my view the question is not one for this Court."

The pursuer reclaimed, and argued—The jurisdiction of the defenders to deal with the matter complained of depended on the National Health Insurance Act 1911 (1 and 2 Geo. V, cap. 55), sec. 8 (1) (a) and 15 (5), and the Medical Benefit Regulations (Scotland) 1913, pars. 45 (1) and 51. Under these enactments the jurisdiction of the defenders to interfere in the relations between a panel practitioner and his patients was confined to medical treatment in the natural sense of that term. It could not be construed so as to cover violent or even abusive language, more especially when the subject-matter of the complaint included also the use of such language to members of the patient's household—Murray's Oxford Dictionary, s.v. "Treatment." Further, the dispute was one between a patient and his panel practitioner, and not between the Committee and the practitioner, with whom alone the Committee were empowered to deal. A statutory jurisdiction of the nature conferred on the defenders was always strictly construed—Maxwell on the Interpretation of Statutes (6th ed.), p. 517. These statutory bodies were in the nature of arbitral tribunals, and their jurisdiction was strictly limited by the terms of the reference—*M'Connell & Reid v. Smith*, 1911 S.C. 635, per Lord Dundas at p. 638, 48 S.L.R. 564. The case of *Board of Education v. Rice*, [1911] A.C. 179, quoted by the Lord Ordinary, did not apply. In that case the statutory body refused to exercise their jurisdiction. In the present case they exceeded it. The fact that the pursuer had appealed to the Board of Health before coming to the Court of Session did not make his action incompetent or amount to waiver of his objection to the jurisdiction, as he was bound to appeal to the statutory Court in the first instance.

Counsel for the respondents were not called on.

LORD JUSTICE-CLERK—The question in this case turns entirely on whether the defenders, or some of them at any rate, had juris-

diction to deal with a complaint by a panel patient to the effect that his panel doctor—the pursuer in this action—had used objectionable and abusive language to the patient and the members of his household who were present at the time of a professional visit. The phraseology as to the complaint is not always the same. In the proceedings before the Insurance Committee the complaint was that the doctor had used insolent language towards the members of the household, and in the proceedings before the two Commissioners who heard it apparently the complaint was that he used objectionable and abusive language to the complainer and members of his household who were present. It was found that the language was open to complaint, and that in point of fact on one occasion the language complained of had been used by the panel doctor in the presence of his patient and his wife and a friend. The Commissioners who dealt with the matter and took evidence for themselves say—“With regard to the first point, namely, the use of abusive language by Dr Bennett on the occasion of his first call on 7th April, we find the complaint proved. Dr Bennett’s attitude and the actual language used by him on that occasion were spoken to by the complainer, his wife, and a friend of the family who was present;” and then they deal with the defence which was put forward by Dr Bennett, who denied that he had employed the language.

The question before them was whether the consideration of such language fell within their jurisdiction. Section 45 (1) of the Regulations says—“Every committee shall constitute a special sub-committee (in these Regulations referred to as the ‘Medical Service Sub-Committee’) for dealing with any question arising between a person entitled to obtain treatment from a practitioner on the panel and the practitioner attending him in respect of treatment (including the granting of certificates) rendered by the practitioner, or the conduct of the insured person while receiving that treatment.” “Treatment” is defined by Article 2 of the Regulations as meaning “medical attendance and treatment.” It seems to me quite plain that the use of such language is a matter that clearly comes within the definition of “treatment” as thus defined, and that the functions of the Medical Service Sub-Committee include an inquiry into such a charge as is made here. It was not language used on the street, or language used when the panel doctor was calling otherwise than as doctor. It was language used by him while he was in point of fact in the patient’s house, and he was there solely in respect that the patient was requiring his attendance as the panel doctor, and was receiving attendance from him in that capacity.

It is said that if this view of the case is taken the jurisdiction of the Medical Service Sub-Committee and of the Board will be extended to matters beyond those which the statute intended they should have jurisdiction over. I am not able to take that view. It seems to me that while the panel doctor is in the house as such, and because

his patient requires his medical attendance and treatment, his conduct with regard to the language which he employs either to the patient himself or to members of his household, at any rate in the patient’s presence and hearing, must necessarily be subject to control and regulation by the Medical Service Sub-Committee, by the Insurance Committee, and by the Commissioners.

Accordingly I think that the subject-matter of the complaint, which was investigated here both by the Medical Service Sub-Committee and by two of the Commissioners as representing the whole body, was a matter which was clearly within the jurisdiction of these bodies, and that accordingly the judgment—which it is not suggested that we are entitled to review on matters of fact—which they have given was one pronounced by them while exercising the jurisdiction which the statute conferred upon them. If that be so, that is enough to determine the case.

The Lord Ordinary has proceeded upon other grounds with regard to the arbitration clauses which have been mentioned. While I do not myself proceed upon these, I am not to be taken as in any way suggesting that I differ from the views the Lord Ordinary expresses upon them. But it is not necessary for us on the view I have taken to express any opinion upon them. I am content with the Lord Ordinary’s judgment in so far as he considers whether the phrase “medical attendance and treatment” fairly read includes in the circumstances jurisdiction with regard to such an investigation as was made here by the Medical Service Sub-Committee and by the Commissioners, and on these grounds as expressed by the Lord Ordinary I think the judgment is sound and ought to be adhered to.

LORD DUNDAS—I am of the same opinion. I think the Lord Ordinary’s conclusion is clearly right, and I agree with his lordship’s observations upon the merits of the question raised and discussed. Article 45 (1) of the Regulations is incorporated as part of the agreement between the pursuer and the Insurance Committee. No doubt in that article “treatment” means primarily—and indeed is defined by article 2 of the Regulations to mean—“medical attendance and treatment.” But “medical attendance and treatment” surely are not limited to the actual administration of drugs or medicines and the diagnosis of ailments, and may surely extend to cover the proper official conduct and behaviour in the performance of his duties by the attending doctor. Reading article 45 (1) as a whole, I do not doubt the jurisdiction of the Medical Service Sub-Committee, and therefore of the Commissioners on appeal (or rather I should say on a re-hearing, for such it seems to be), to consider and finally decide a charge against a panel doctor that he was abusive to his client or to members of his household while engaged on a professional visit. It does not seem to me to be at all inappropriate that such a body or bodies should have some reasonable control over the exercise by panel doctors of proper professional con-

duct in their intercourse with their patients. And the language of article 45 (1), as I have said, seems to me to be quite wide enough to cover the professional relationship generally between such doctors and such patients.

If I am right, that ends the question of jurisdiction raised by this action of reduction. I am not sure whether or not I should agree in an additional ground—as the Lord Ordinary calls it—mentioned in the last two paragraphs of his opinion. It is quite unnecessary to consider that. It would at best be an additional ground, and the ground which I have mentioned appears to me to be amply sufficient for the decision of the case. I therefore express no opinion upon these last two paragraphs, but with the general question, which I have intimated as the ground of my judgment, it seems to me that the Lord Ordinary has dealt judiciously and well.

In my judgment the action fails.

LORD SALVESEN—As at present advised I agree with the contention of the pursuer that the action is competently brought before this Court, and that it must succeed if the Committee exceeded the jurisdiction conferred upon them under the Regulations. There is only one ground on which it is said that they exceeded their jurisdiction, and that is that they imposed a sentence of censure upon the pursuer in respect of abusive language which he is said to have used at the bedside of a patient to whom he was called as the panel practitioner of the district. I am willing to accept also the contention that in a question of jurisdiction one must strictly construe the words that are used. But even so I think that the conduct attributed to the doctor here comes within the words “medical attendance and treatment.” I think it is impossible to hold that these words relate exclusively to diagnosis and the administration of drugs. I think they must and do reasonably include the mode of administration, and generally the conduct of the doctor at the patient’s bedside.

Further, I cannot imagine any more appropriate tribunal of first instance to inquire into matters of that kind than one which was composed, to the extent of nearly one-half of its members, of doctors, nor one of last resort—to wit, the Board of Health, which was composed of a layman and a doctor. In my view the pursuer’s case fails upon the merits on the ground that he has not set forth a relevant ground to oust the jurisdiction of the Sub-Committee and the other tribunal which dealt with this somewhat paltry dispute. On the other hand, if it had been clearly shown that this was a matter with which the Committee were not charged, either under their agreement with the practitioner or under the Regulations, then of course the pursuer would have been perfectly entitled to obtain redress in an action at law.

If it was within the jurisdiction of the Committee and of the Board of Health who successively pronounced upon this matter, then it is not disputed that their decision is final. But I would like to add that I think

the pursuer received an eminently fair and patient hearing from the Commissioners, now represented by the Board of Health, and that he has no ground of complaint against the decision other than that he does not personally agree with it.

On this ground the Lord Ordinary was perfectly right in dismissing the action as irrelevant, although I do not think, as at present advised, I could agree with the other grounds upon which he proceeded.

LORD ORMIDALE—I am of the same opinion. “Treatment” as defined in the Regulations means “medical attendance and treatment,” and it seems to me that is an expression quite wide enough to embrace and cover the general attitude and demeanour of a practitioner when called in officially to attend a patient. Very often nothing may more directly conduce to the success or non-success of any course of “treatment” (using that word in the more technical sense) than the way in which it is administered. Much frequently depends on the manner in which the patient is instructed or advised by the doctor in regard to the course he is to follow. But if while discharging his professional duty the doctor addresses insolent or abusive language to the patient or to the members of his household who are about him, the word “treatment” is sufficiently general to include such conduct to the effect of giving the patient a right to invoke the aid of the Committee. And it seems to me important that it should be so because of the peculiar relation that exists between the patient and his panel doctor. The panel patient cannot in ordinary course get rid of his doctor, as the ordinary patient can, except once a year; and it would be very unfortunate if there were not some way of controlling the general bearing of the panel practitioner towards his patient. I can imagine no tribunal more fitted, as your Lordships have said, to inquire into and deal fairly with this sort of question than the Committee.

I should like to reserve my opinion with reference to the second ground mentioned by the Lord Ordinary in the conclusion of his opinion. At the moment I am inclined to take a different view from the Lord Ordinary on the construction and application of the articles referred to.

The Court adhered.

Counsel for the Pursuer—Mackay, K.C.—Gibson. Agents—Manson & Turner Macfarlane, W.S.

Counsel for Defenders, The Scottish Board of Health—Wark, K.C.—Fenton. Agent—J. M. Vallance, W.S.

Counsel for Defenders, The Insurance Committees and the Medical Sub-Committees for the Burgh of Glasgow—Wark, K.C.—Jas. Macdonald. Agent—Thos. J. Addly, Solicitor.