

LORD JOHNSTON was absent at the hearing.

The Court pronounced this interlocutor—

“ . . . Refuse the appeal: Affirm the interlocutor of the Sheriff dated 22nd October 1910: Find in fact in terms of the first two findings in fact therein: Find further in fact that up till June 1908 the Tramway Advertising Company fulfilled the contract mentioned in said first finding of the Sheriff, and (4) that from and after June 1908 the pursuers have not been in a position to implement said contract: Find in law that the pursuers are not *in titulo* to demand implement of the said contract by the defenders, but further, inasmuch as the Sheriff has found £18 due by the defenders for advertising which the pursuers supplied to them though not under said contract, and the defender acquiesces in this finding, decern against the defenders for payment of the sum of £18. . . .”

Counsel for the Pursuers and Appellants—Blackburn, K.C.—Wilton. Agents—Henderson & M'Kenzie, S.S.C.

Counsel for the Defender and Respondent—J. R. Christie—Fenton. Agents—Simpson & Marwick, W.S.

Saturday, December 24.

SECOND DIVISION.

[Sheriff Court at Hamilton.]

MORGAN v. WILLIAM DIXON LIMITED.

Master and Servant — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Sched. I, sec. (4)—Examination of Workman by Medical Practitioner.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I (4)—“Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place.”

A workman having claimed compensation under the Workmen's Compensation Act 1906, his employers required him to submit to examination by a duly qualified medical practitioner provided and paid by them. The workman refused except on condition that his own medical attendant was present throughout the examination. He conceded that there were no special circumstances in his case which called for the presence of his medical attendant.

Held that the workman was not entitled to refuse to submit to examination unless his own medical attendant was present.

This was a stated case from the Sheriff Court at Hamilton in an arbitration under the Workmen's Compensation Act 1906 between David Morgan, driver, High Blantyre (*appellant*), and William Dixon Limited, Blantyre Colliery, Blantyre (*respondents*).

The Case stated—“This is an arbitration in which the appellant claimed an award of compensation under the said Act in respect of an injury to his left foot, which injury is alleged to have been sustained while he was in the employment of the defenders as an underground driver on 3rd June 1910.

“After the petition for an award of compensation had been presented the respondents required the appellant to submit himself for examination by a duly qualified medical practitioner provided and paid by them, under section 4 of the First Schedule of said Act.

“The appellant, however, refused to submit himself for such examination unless upon condition that his own medical attendant should be present throughout the examination.

“The respondents refused to accede to this condition, and contended that appellant's refusal to submit himself to medical examination unless on the condition above referred amounted to obstruction in terms of the said section. They lodged a minute in the arbitration craving the Court to sist the appellant's application for arbitration until he submitted himself for medical examination in terms of said section.

“Parties were heard upon this minute, and it was conceded in argument by the appellants that there were no special circumstances in his case which called for the presence of his medical attendant at the examination, his contention being that it is the right of the workman in every case, without alleging any special reason, to have his medical attendant present at the examination, and to refuse to submit himself for examination unless and until his employers consented thereto.

“The arbiter, while willing to consider any special grounds which might make it expedient that the appellant's medical attendant should be present, held that the appellant's contention was not well founded, and he accordingly granted the crave of said minute, and sisted the application for arbitration until the appellant submitted himself for medical examination as required by the respondents.”

The *question of law* for the opinion of the Court was—“Whether, apart from any special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employers, in terms of section 4 of the First Schedule of the Workmen's Compensation Act 1906, and whether the workman's refusal to submit himself for examination unless his doctor is allowed to be present

amounts to 'refusal' or 'obstruction' in terms of said section?"

Argued for appellant—The respondents would have some difficulty in explaining to the Court why they objected to the presence of the workman's doctor. It was by means of medical evidence that the truth as to his condition would be ascertained. Moreover, according to universal practice *inspectio corporis* was made in presence of the medical adviser of the party examined. The appellant had not "refused" to submit to examination within the meaning of the Act—*Devitt v. Owners of Steamship "Bainbridge"* [1909], 2 K.B. 802.

Argued for respondents—It was conceded before the arbiter that there were no special circumstances calling for the attendance of the appellant's medical adviser. In *Devitt v. Owners of Steamship "Bainbridge"* (*sup. cit.*) the arbiter held that the workman had not "refused" within the meaning of the section. All that the Court there decided was that his conduct was reasonable in the circumstances. The true view was that the employer was absolutely and unconditionally entitled to have the workman examined by a medical practitioner without anyone else being present—*Osborn v. Vickers, Sons & Maxim* [1900], 2 Q.B. 91. The Regulations by the Secretary of State as to the medical examination said nothing whatever about the workman's right to adject a condition—Statutory Rules and Orders, 28th June 1907, Workmen's Compensation Act 1906. The only purpose of the examination was that the employer might be medically advised as to whether he should make a tender.

LORD JUSTICE-CLERK—Both parties have stated that this is a question which they desire should be settled. I take it that the appellant comes here as the representative of the whole class of workmen to have it decided whether under section 4 of the first schedule of the Workmen's Compensation Act 1906 a workman is entitled as matter of right to refuse to submit himself for examination by a medical practitioner provided and paid by the employer unless his own medical man is present. That being the question which we have to determine, I have no hesitation or difficulty in deciding that the workman is not so entitled. The purpose of the examination is a legitimate and proper purpose. It is that the employer may obtain from a man of skill an opinion as to the workman's then condition in order that he may consider whether he will be a party to a litigation, or will agree to give reasonable compensation without litigation to the man who has been injured. He ought, I think, to be allowed to do that—except in special circumstances—without being interfered with by anybody or watched by anybody, provided he employs a proper medical practitioner well qualified to make the examination and to supply him with a report.

If I thought that any of the decided cases laid down such a rule as the appellant maintains I should certainly consider that

this case required to be dealt with by a larger Bench. I do not find that any such rule has been laid down in any case that has been decided. The latest case is the case of *Devitt* [1909], 2 K.B. 802, decided by the Master of the Rolls and two other Judges in the Court of Appeal, where the circumstances were simply these—A medical practitioner for the master called on a man who had been injured and asked to be allowed to examine him. The workman said that he had no objection provided his own doctor was present. The medical man took that as a refusal to be examined and went away; and then it was maintained that the compensation should be stopped because the workman had refused to be examined by the medical man of the master. In that case the arbitrator decided that that was not a refusal in terms of the statute, and I think he was right. The Court of Appeal upheld his judgment in the circumstances disclosed, deciding that it was not reasonable to hold that the workman had refused to be examined. There may have been many circumstances in that case as to which no inquiry or investigation was made, but which might have made the suggestion of the workman a perfectly reasonable and proper suggestion. It might have been most dangerous to the man himself to proceed without the practitioner being present who knew him and knew the state of his health and constitution, and who, if anything was being done in the course of the examination, could suggest that something ought to be done or something ought not to be done as the case might be. That is not the kind of case we have here.

In regard to the other case quoted—*Osborn v. Vickers, Sons & Maxim* [1900], 2 Q.B. 91—which also came before the Court of Appeal, I agree with everything that Lord Justice Collins, afterwards Master of the Rolls, said in that case—he states most properly that the refusal of the workman to submit to examination without the presence of his own medical man may be reasonable or it may not. I think the whole circumstances stated by the Sheriff-Substitute indicate that in this case the refusal was not reasonable, and therefore I am for refusing the appeal.

LORD ARDWALL—I concur. If the first part of this question were to be answered in the affirmative it would mean that a workman in all cases of this kind has an absolute right to refuse to be examined unless his own medical man is present at the examination, which he is bound to submit to under section 4 of the First Schedule annexed to the Workmen's Compensation Act 1906 under pain of losing his right to compensation. It appears to me that it is out of the question that any such rule should be laid down. There may be cases in which it is exceedingly proper that the workman should have his own medical man present; and one can imagine many such cases, where, for example, the workman is subject to an affection of the heart or something of that kind. But all that is

saved by the way the question is here put, and I have no hesitation in agreeing with your Lordship that we should affirm the decision of the Sheriff-Substitute.

LORD DUNDAS—I think the very terms in which the question is stated invite and indeed necessitate a negative answer to the first part, and in effect an affirmative answer to the second.

LORD SALVESEN—I concur. I should prefer that the first branch of the question should be answered in the negative, and that the second branch should not be answered at all.

LORD JUSTICE-CLERK—We shall answer the first part of the question in the negative, and with regard to the second part we shall find that the appellant's refusal to submit to examination unless his own doctor is allowed to be present amounted, in the special circumstances of this case, to a refusal in terms of section 4.

The Court pronounced this interlocutor—

“Answer the first branch of the question of law . . . in the negative, and the second branch thereof by finding that the workman's refusal to submit himself for examination unless his doctor was allowed to be present amounted in the circumstances of the stated case to refusal in terms of section 4 of the First Schedule of the Workmen's Compensation Act 1906: Therefore refuse the appeal, and decern,” &c.

Counsel for the Appellant—Moncreiff. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Dean of Faculty (Dickson, K.C.)—Carmont. Agents—W. & J. Burness, W.S.

Saturday, January 14, 1911.

SECOND DIVISION.

[Sheriff Court at Paisley.]

BABCOCK & WILCOX, LIMITED, v.
YOUNG.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, sec. 2 (c)—Compensation—Average Weekly Earnings—Computation—Grade of Employment.

A workman who was by trade a boilermaker, and who had been employed for some time as a boilermaker and for some time as a labourer under the same employer, met with an accident while employed as a labourer. In an application by his employers to review and end compensation paid to him under a verbal agreement, the arbiter, in calculating his “average weekly earnings,” took into account the amount which the workman had earned as a boilermaker, and awarded him compensation on the average wage thus ascertained. *Held* that the com-

pensation must be based on the wages the workman was earning in the grade of employment in which he met with the accident, and that the arbiter could not competently include his wages as boilermaker.

Perry v. Wright, 1908, 1 K.B. 441, approved and followed.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule, enacts—“(1) The amount of compensation under this Act shall be—(b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer. . . . (2) For the purpose of the provisions of this schedule relating to ‘earnings’ and ‘average weekly earnings’ of a workman the following rules shall be observed—(c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.”

This was a stated case on appeal in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between Babcock & Wilcox, Limited (*appellants*), and William Young (*respondent*) against a decision of the Sheriff-Substitute (LYELL) at Paisley acting as arbitrator.

The Case stated—“This is an application to review and end weekly payments made by the appellants to the respondent by virtue of an agreement under the Workmen's Compensation Act 1906. Proof was led before me and the medical referee—sitting as assessor in terms of paragraph (5) of the Second Schedule of the statute—on 7th November 1910, and the following facts were proved:—

“The respondent is by trade a boilermaker, and was for nineteen weeks prior to 1st February 1910 in the employment of the appellants. He did not, however, work as boilermaker for the whole of that period. For fifteen out of the nineteen weeks he worked as a labourer at a wage of 20s. 3d. per week. For the other four weeks, during which he worked as a boilermaker—which is a trade, and distinct from the work of a labourer—he was paid by piece-work, and it was agreed that his average weekly earnings during the whole of the period of his employment were thus increased to 25s. On 1st February he was working as a labourer when he was accidentally injured by being struck on the middle finger of the left hand with a crowbar. He was off work for one week, when he returned and worked as a boilermaker from 8th to 14th February, when blood-poisoning set in, with the result that the finger is permanently stiffened in such a position as to incapacitate him wholly from following his trade as a boilermaker, but not from doing the work of a labourer at 20s. a-week.