Tuesday, June 23.

FIRST DIVISION.

[Sheriff Court of Lothians at Linlithgow.

SWEENEY *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37)—*Refusal by Injured Workman to Undergo Surgical Operation.*

A workman in the course of his employment sustained an injury to the elbow of his right arm, consisting of a fracture of the head of the radius, which disabled him from following his occupation and rendered it improbable that he could resume it unless he submitted to a surgical operation consisting of opening into the elbow joint in order that a loose piece of bone might be removed. Two medical practitioners examined the workman on behalf of the employers, and both advised him to undergo the operation. The operation was an "important minor operation," established in surgical practice, and not attended by any appreciable risk. It was stated in the case to be such an operation as a reasonable man not claiming compensation would elect to undergo. The workman having refused to undergo the operation, the arbitrator found that in respect of his refusal he was precluded from meantime insisting further in his application for compensation under the Workmen's Compensation Act 1897.

In an appeal it was stated at the bar on behalf of the workman, and admitted on behalf of the employers, that the workman had been advised by an eminent surgeon, who had treated him after his injury and had examined him again after the arbitrator's decision, to have no operation performed.

Held that the workman by his refusal to undergo the surgical operation had not precluded himself from insisting further in his application for compensation.

This was a stated case in an appeal by Robert Sweeney, miner, Bathgate, the claimant in an arbitration under the Workmen's Compensation Act 1897, brought by him against the Pumpherston Oil Company, Limited, Bathgate, in the Sheriff Court of the Lothians at Linlithgow, for compensation at the rate of 16s. 9d. per week from and after 10th June 1902, until the claimant was able to earn his full wages or until the further orders of the Court.

The Sheriff-Substitute (M'LEOD) stated as follows:—"The appellant was entitled to compensation under the Workmen's Compensation Act from the respondents for an injury to the elbow of his right arm, received by him on 3rd June 1901 while in their employment. The injury thus received by the appellant still unfits him from following his ordinary occupation as a miner, and there is no reasonable prospect that his right arm will become a useful limb unless he submits himself to the operation after mentioned. The appellant, who is a very healthy subject, was examined on 15th March 1902 by a medical practitioner on behalf of the respondents, and was also examined on 18th July 1902 by another medical practitioner on behalf of the respondents, and was on both occasions advised that he ought to undergo the operation after mentioned; but even though the compensation pay of 16s. 9d. a-week, which the respondents had paid him up to 10th June 1902, was stopped as at that date, the appellant has hitherto refused to submit himself to the said operation. The injury received by the appellant was a fracture of the head of the radius, one-half of which became separated, and is now partially united in a faulty position, and the result of the injury is interference with and consequent pain upon the movements of the elbow joint. The operation advised is that of opening into the elbow joint in order that the loose piece of bone may be removed. This operation (1) is an important minor operation; (2) is not in the nature of an experiment, but is established in surgical practice; (3) has been attended by complete success in all the similar cases (five in number) regarding which evidence was led before me; (4) is not attended by any appreciable risk, the risk of septic mischief (that being practically the only danger which might arise) being indeed less than in the case of the operation which was advised in the case of *Anderson* v. *Baird & Company*, January 15, 1903 (for in this case I had the advantage of the evidence of the eminent surgeon who advised both in the case just cited and in this case); (5) will in all probability within two months, or a little longer, restore to the appellant the use of his right arm, and enable him to earn wages as before; and (6) is such as a reasonable man not claiming compensation or damages would, for his own advantage and comfort, elect to undergo.

"Being of opinion that the case of *Anderson* v. *Baird*, January 1903, applied to the foregoing facts, I advised the appellant to reconsider his position, and of date 6th February 1903 continued the case till 1st May next, in order that he might, if so advised, submit himself to the operation, and that it might be ascertained whether he had then been enabled to earn wages as before.

"However on 20th February 1903 the appellant intimated that he had decided not to undergo the operation, and craved me to proceed as if the 1st of May had arrived, and to dispose of his application aforesaid.

"Accordingly on 20th February 1903 I found in law (following the above recited case of *Anderson* v. *Baird & Company*) that the appellant was, in respect of his refusal to undergo the above-mentioned operation, precluded from meantime insisting further in the application above narrated, but in order to keep the matter open

for future developments I awarded him the sum of one penny weekly until the further order of the Court."

The question of law for the opinion of the Court was—"Whether the applicant, by his refusal to undergo the operation referred to, is meantime precluded from insisting further in his application?"

It was stated by counsel for the appellant that Professor Annandale, who treated the appellant in the Edinburgh Royal Infirmary after his accident, had declined to operate, upon the ground that the success of an operation was not certain, and that Professor Annandale having subsequently examined the appellant on 25th February 1903, had written, of date 2nd March 1903, a letter to the appellant's agent in these terms:—"I have again carefully examined Robert Sweeney's arm and I find that the movements of his elbow joint have much improved. I have strongly advised him to have no operation performed, therefore adhering to my former opinion." Counsel for the respondents admitted the authenticity of this letter.

Argued for the appellant—The Sheriff-Substitute had proceeded solely on the authority of *Anderson* v. *William Baird & Company, Limited*, January 15, 1903, 40 S.L.R. 263. In that case the interlocutor was pronounced of consent, and the judicial opinions for and against the view that the workman was bound to submit to the surgical operation there in question were equally balanced. The question was whether in the circumstances the surgical operation was such as any reasonable man would adopt—per Lord Adam in *Dowds* v. *Bennie & Son*, December 19, 1902, 40 S.L.R. 239. In *Dowds* the medical treatment proposed was of a very simple and common kind, and in *Anderson* the operation was described as a "simple operation not attended with serious risk or pain." In the present case, however, the surgical operation was described as an "important minor operation," and in face of the strong advice of Professor Annandale to the appellant to have no operation performed, it was certainly not unreasonable in him to decline to submit to the proposed operation. There were five findings in fact by the Sheriff, in respect of which the Sheriff had come to a sixth finding viz., that the operation was such as a reasonable man would elect to undergo; but this sixth finding was really a finding in law to the effect that the appellant was bound in law to submit to the operation, and would forfeit his right to compensation by refusing so to do. Such a finding in law was unwarranted by the statute.

Argued for the respondents—On the facts stated in the case the operation proposed was such as a reasonable man would elect to undergo. The Sheriff-Substitute in his sixth finding had expressly found this as a fact, and it was not competent to consider evidence of facts outside the stated case—*Rae* v. *Fraser*, June 28, 1899, 1 F. 1017, 36 S.L.R. 782. The statements made at the bar as to Professor Annandale's opinion were, accordingly, irrelevant. The case was *a fortiori* of *Anderson* v. *William Baird & Company* (*supra*), in respect that in the latter case the workman had already submitted to two operations without success, and there it undoubtedly had been held that the refusal of a workman to submit to a remedy that would remove his incapacity for wage-earning involved forfeiture of his right to compensation. It was open to the appellant to submit himself to a medical practitioner appointed for the purposes of the Act—*M'Avan* v. *Boase Spinning Company*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772; *Ferrier* v. *Gourlay Brothers*, March 18, 1902, 4 F. 711, 39 S.L.R. 453.

Lord President—The question in this case is whether the appellant has disentitled himself to compensation under the Act of 1897 by refusing to submit himself to an operation.

The material facts are that the appellant became entitled to compensation under the Workmen's Compensation Act from the respondents for an injury to the elbow of his right arm received by him on 3rd June 1901 while in their employment; that the injury thus received by the appellant still unfits him from following his ordinary occupation as a miner; and that there is no reasonable prospect that his right arm will become a useful limb unless he submits himself to an operation. The appellant, who is stated to be a very healthy subject, was examined on 15th March 1902 by a medical practitioner on behalf of the respondents, and was also examined on 18th July 1902 by another medical practitioner on their behalf, and was on both occasions advised that he ought to undergo the operation before mentioned, but although the compensation pay of 16s. 9d. a-week which the respondents had paid to him up to 10th June 1902 was stopped as at that date, the appellant has refused to submit himself to the operation. The injury which he had received was a fracture of the head of the radius, one half of which became separated, and is now partially united in a faulty position, and the result of the injury is interference with and consequent pain upon the movements of the elbow joint. The operation advised is that of opening into the elbow joint in order that the loose piece of bone may be removed. It is stated in the case that this operation (1) is an important minor operation, (2) is not of the nature of an experiment, but is established in surgical practice, (3) has been attended by complete success in all the similar cases (five in number) regarding which evidence was led, (4) is not attended by any appreciable risk, the risk of septic mischief (that being practically the only danger which might arise) being indeed less than in the case of the operation which was advised in the case of *Anderson* v. *Baird & Company*, 15th January 1903, (5) will in all probability within two months or a little longer restore to the appellant the use of his right arm and enable him to earn wages as before, and (6) is such as a reasonable man not claiming compensation or damages would for his own advantage and comfort elect to undergo.

The Sheriff found that the appellant was in respect of his refusal to undergo the above-

mentioned operation precluded from insisting further in his application above narrated, but in order to keep the matter open the Sheriff awarded him the sum of 1d. weekly until the further orders of the Court.

I do not say that an operation might not be of such a slight character that a person who declined to submit to it might be held thereby to have forfeited his right to compensation, but even assuming (without deciding) this, it appears to me that the operation proposed is not of a slight or trivial character. It is described in the case as "an important minor operation," thereby no doubt distinguishing it from those serious operations which in surgical practice are known as major operations, and it appears to me that a person might quite honestly and conscientiously decline to submit himself to such an operation. But without going into the question as to the character or gravity of the operation, it is probably sufficient for the purposes of the present question to say that it was stated at the bar, and as I understood admitted by the respondents, that the appellant had been advised by his own eminent surgical adviser (Professor Annandale) not to undergo the operation. I do not think that in the absence of any provision in the Act of 1897 that injured workmen should be required to submit to any operation which might be advised by medical men, consulted by their employers, the Court would be justified in holding that they were bound to undergo such operations as a condition of receiving compensation. This would be adding another condition to those specified in the Act. Upon the facts stated I think a person might quite honestly and conscientiously shrink from submitting himself to such an operation, and we would not in my judgment be warranted in holding that because he did so he should be deprived of the statutory compensation. The present case appears to me to be materially different from those of *Dowds* v. *Bennie & Company* and *Anderson* v. *Baird & Company*, which were referred to in the argument.

For these reasons I am of opinion that the answer to the question put in the case should be that the applicant is not by his refusal to undergo the operation mentioned precluded from insisting further in his application for compensation.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion. I think it is always a question of circumstances whether in a particular case it is the duty of the injured person to undergo an operation for the recovery of his health in his own interest as well as in that of his employer. One thing that materially aids me in coming to a decision in the present case is that the workman, as he was quite entitled to do, consulted a surgeon of eminence of his own selection, who advised him that it would be better that he should not undergo the operation. Now, we have not the evidence of that surgeon in the case, and therefore we cannot weigh the evidence of one surgeon against the other. You cannot weigh anything unless you have it before you. But it was admitted most properly that the statement that the injured man had consulted Professor Annandale was a true statement, and therefore we have the fact that advice was given against the operation. Now, without weighing the evidence of the one surgeon against the other, I think that in a balanced state of medical or surgical opinion it would be hard to say that the workman is to lose his right of compensation because he does not make a selection between those two opinions such as the employer would approve. I also assent to all the considerations which are brought out in the opinion of your Lordship in the chair.

LORD KINNEAR—I agree with your Lordships. The only difficulty which I have seen in the case is created by the last finding in the Sheriff's statement of facts, because the learned Sheriff finds, after setting out certain facts descriptive of the operation proposed to this man, that it was such as a reasonable man not claiming compensation or damages would for his own advantage and comfort elect to undergo. Now, if this is to be taken as a finding in fact, it certainly presents a formidable obstacle to the appeal, because it might very well be argued that this finding in fact states that the present condition of the man is not due directly to the accident by which he was injured, but is due directly to his own unreasonable conduct in not taking proper measures to recover.

That is an argument to which we were asked to give effect, and there is this to be said in support of it—that we cannot review the Sheriff's judgment upon questions of fact, because the statute expressly limits the right of appeal to questions of law which are stated for us in a special case by the Sheriff. But then it sometimes requires a good deal of law to get rid of law and to state a question exactly in pure terms of fact, and I am not at all sure that this has been done with perfect success when an arbiter puts to himself the question whether a man's conduct in rejecting a condition proposed to him by his employer is reasonable and ought to be supported or not. I rather think that the true intent and meaning of this last finding in the Sheriff's statement is that the workman was under an obligation at law to submit to the operation proposed to him by his employer, and that he has forfeited his claim to compensation by declining to do so. That seems to me the true meaning of the Sheriff's judgment, and I must say I know of no principle upon which any such doctrine could be maintained. I agree entirely in both reasons for rejecting it given by your Lordship. In the first place, I think with the Lord President that if we take the statement as it stands, without reference to anything that is not brought before us by the statement of facts in this special case, no man is under obligation to submit to what surgeons call an important operation if he has any reason sufficient to his mind at the time deterring him from doing so,

even though there may be a consensus of medical opinion in favour of the operation proposed as the proper and probably successful treatment—I mean a consensus of opinion among the doctors examined by the Sheriff. I think it must always remain a question, as the Sheriff himself seems to think it does, whether for his own advantage or comfort the patient will elect to suffer an important operation, or whether he prefers to endure the discomfort which arises from leaving the operation unperformed, and I should certainly hesitate very much to say that anybody can be compelled to decide that question in one way or other irrespective of his own feelings. But then I think the other reason which has been stated, and especially by Lord M'Laren, is extremely material in this case, and it was this—we cannot take into account any evidence, whether documentary or oral, of facts which are not set forth in this special case. But I think it is quite consistent with our rule that we should pay proper attention to admissions of facts made by counsel at the bar, and that it would be an injustice if, when a fact is alleged by counsel on one side and properly admitted by counsel on the other, we should refuse to consider it merely because it has not been brought within the special case in a really formal manner. Now, counsel have agreed that although the doctors on whose opinion the Sheriff relies, and who I have no doubt we must assume were men of perfectly competent skill and experience, advised the operation, the doctor who had treated the man in the Infirmary, and advised him personally afterwards, was of a contrary opinion, and said the operation should not be performed, and advised his patient against undergoing it, and I am quite unable to say that when the man acted on the advice of Professor Annandale, though it was contrary to the opinions of other doctors, he was acting in a way in which no reasonable man would have acted in view of his advantage and comfort. But the only other way that I regard that statement is that even if we were not to proceed on it as matter of fact it is an exceedingly valuable illustration of the first argument on the question whether the Sheriff's statement of fact is conclusive against the reasonableness of the conduct of this man, because there is nothing in what the Sheriff says which is inconsistent with the statement made at the bar about Professor Annandale's opinion, and that shows that all these things that the Sheriff states may be predicated with reference to a particular case, and yet that a most eminent surgeon may have a different opinion and advise that no operation should be performed. And I think that is a perfectly sufficient reason for rejecting those statements as being in themselves conclusive to show that a man is not suffering from an injury caused by accident, but is suffering only from the consequences of his own unreasonable conduct—because that is really the point at issue in a question of this kind. If a man is suffering from an accident he is entitled to compensation. 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.

The Court pronounced this interlocutor—

"Find in answer to the question in the case that by his refusal to undergo the operation referred to in the case the appellant has not precluded himself from insisting further in his application, and decern."

Counsel for the Appellant—Watt, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Campbell, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Tuesday, June 23.

FIRST DIVISION.

[Sheriff Court of the Lothians at Edinburgh.

THE PUMPHERSTON OIL COMPANY, LIMITED *v.* CAVANEY.

Master and Servant—Workmen's Compensation Act 1897, *Schedule I., sec.* 12—*Review of Weekly Payments.*

Held (*diss.* Lord M'Laren) that in an application for review of a weekly payment under the Workmen's Compensation Act 1897 the applicant is not entitled to have the weekly payments reviewed as from any date prior to the date of the arbitrator's award in the application for review.

Section 12 of the first schedule of the Workmen's Compensation Act 1897 enacts—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act."

This was an appeal in an arbitration under the Workmen's Compensation Act 1897, between the Pumpherston Oil Company, Limited, appellants, and John Cavaney, pithead labourer, West Calder, claimant and respondent.

The case stated by the Sheriff-Substitute (HENDERSON) was as follows:—"On 31st October 1901 the respondent met with an injury to his left hand at appellants' works, which totally incapacitated him from earning wages. His average weekly wages for the twelve months prior to that date were 38s., and the appellants paid him 19s. per week until 28th March 1902, when they ceased making payments on the ground that he was from that date fitted to return to work. The appellants agreed to pay the respondent 19s. per week as compensation, and a memorandum of this agreement was