dated 30th December 1902, and of this Court dated 19th June 1903, notwithstanding the appeal to the House of Lords, to the effect that the defender ought and should be interdicted, prohibited, and discharged from carrying on the practice of a doctor of medicine and surgeon in the village or district of Ballachulish, and in particular from acting as a medical practitioner or surgeon in any manner of way to the employees of the petitioners and their families, and to the old men who had previously been employees of the pursuers and to their families in the said village or district of Ballachulish, and of enabling the petitioners to lodge their account of expenses with the Auditor of the Court of Session to tax and to report, and thereafter to recover the taxed amount thereof on caution for repetition of the said amount in the event of the before-mentioned interlocutors being reversed by the House of Lords: Supersede extract for two months from this date, and decern."

Counsel for the Pursuers and Respondents — Clyde, K.C.—Cooper. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defender and Reclaimer —Campbell, K.C.—T. B. Morison. Agents— Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, July 14.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

NIDDRIE AND BENHAR COAL COMPANY, LIMITED *v.* M'KAY.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, secs.* 11 *and* 12; *Second Schedule. sec.* 13—*Medical Examination —Refusal—Obstruction—Workman Dissatisfied with Certificate—Application for Review — Failure of Workman to Submit himself for Examination by Official Medical Practitioner under the Act — Remit by Sheriff—Suspension of Compensation — Powers of Sheriff as Arbitrator under the Act.*

A workman who had been injured in the course of his employment entered into an agreement with his employers whereby compensation was paid at the rate of 12s. 6d. per week. A memorandum of this agreement was recorded in the register kept by the sheriff-clerk The workman submitted himself for examination by a medical man, provided and paid for by the employers, who on 7th December 1902, certified that the workman was fit for work. The workman intimated to the employers that he was dissatisfied with this medical certificate, but did not submit himself for examination by one of the medical practitioners appointed for the purposes of the Workmen's Compensation Act, owing, as he alleged, to inability to pay the fee. On February 11th 1903 the employers, while continuing to pay the compensation fixed by the agreement, presented an application for review under section 12 of the First Schedule of the Workmen's Compensation Act 1897 before the Sheriff, alleging that the workman's incapacity for work had ceased on November 7th 1902. The employers offered no evidence, and objected to an allowance of proof, on the ground that the workman's right to compensation was suspended from November 7th 1902 until he should submit himself for examination by one of the medical practitioners appointed under the Act. The Sheriff remitted, under section 13 of the Second Schedule to the Act, to a medical practitioner appointed for the purposes of the Act to report as to the condition of the workman, and thereafter, on consideration of his report, ordained the employers to pay to the workman 9s. 6d. per week.

Held (1) that the workman's failure to submit himself for examination by one of the medical practitioners appointed for the purposes of the Act did not disentitle him to a proof in the application to the Sheriff for review, and (2) that in the circumstances the remit by the Sheriff and the award of compensation following thereon were within the powers of the Sheriff as arbitrator under the Act.

Davidson v. *Mossend and Summerlee Iron and Steel Company, Limited,* June 10, 1903, 40 S.L.R. 764, *distinguished* and *commented on.*

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule, enacts (Sec. 11—"Any workman receiving weekly payments under this Act shall, if so required by the employer, . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, . . . and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." Sec. 12—"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." . . .

John M'Kay, 76 Jewel Cottages, Portobello, a miner in the employment of the Niddrie

and Benhar Coal Company, Limited, met with an accident on February 24th 1902, whereby he sustained injuries which disabled him from following his ordinary employment. M'Kay's earnings at the time of the accident amounted to 25s. per week, and the compensation payable to him under the Workmen's Compensation Act 1897 was settled by agreement at 12s. 6d. per week. He was paid compensation at this rate from March 10th 1902, and at the date of the appeal after mentioned was still receiving compensation.

On February 9th 1903 a memorandum of the foresaid agreement, dated January 30th 1903, was recorded at the instance of the workman in the special register kept for that purpose by the Sheriff-Clerk

On February 11th 1903 the Niddrie and Benhar Coal Company presented to the Sheriff-Substitute at Edinburgh (HENDERSON) an application for review under section 12 of the First Schedule of the Act alleging that M'Kay's incapacity for work arising from his injuries did not extend beyond November 7th 1902.

The case came before the Court of Session on an appeal by the Niddrie and Benhar Coal Company (appellants) against the interlocutor pronounced by the Sheriff-Substitute in this application for review.

The case for appeal stated:—"The respondent was examined by a medical practitioner provided and paid for by the appellants who on 7th November 1902 granted a certificate that the respondent was fit for work. Thereupon the appellants intimated to him that his compensation would be stopped unless he submitted himself to examination by a medical referee, under section 11 of the first schedule of the said Act. The respondent intimated to the appellants that he was dissatisfied with said medical certificate, but prior to the presentation of the said application [*i.e.* the application for review] the respondent, while alleging that he was willing to discharge all statutory obligations incumbent upon him, did not submit himself to examination by one of the medical experts appointed under the Act owing to his inability, as he averred, through poverty to pay the fee in connection therewith. In these circumstances I suggested that the parties might lodge any medical certificates upon which they respectively founded. The appellants did not produce the medical certificate of 7th November 1902, and opposed an allowance of proof on the ground that the respondent not having submitted himself for examination by a medical referee when called upon to do so had no other remedy under the Act. No evidence was led before me. The respondent produced a certificate under the hand of a medical practitioner, dated 14th February 1903, certifying that in his opinion respondent was suffering from spinal cord debility and unable to resume his usual employment.

"Considering that the medical certificate produced by the respondent was not sufficient to enable me to dispose of the said application, and also holding that the delay on the part of the respondent to submit himself for examination on the ground of alleged poverty did not necessarily terminate his right to compensation, I, on 10th March 1903, under section 13 of the second schedule appended to the said Act, and relative regulations, remitted to one of the medical referees under the act to report whether the respondent was physically fitted to return to his former work, or if not, to what extent he was capacitated for work or incapacitated from work. The respondent after this remit duly submitted himself to examination by the medical referee. On 26th March 1903, the medical referee having made his report, I pronounced the following interlocutor:—*Edinburgh, 26th March* 1903.—The Sheriff Substitute having considering the report of the medical referee appended to the reference made to him, Finds in terms of said report that John M'Kay, the workman with regard to whose physical state the said reference was made, is still unfit for his usual employment, that he is only capable of light work with his hands, and that it is at present impossible to fix any date at which he may be able to resume his ordinary work; therefore, as it appears from the report of the medical referee that M'Kay, although still unfit for his usual employment, is capable of some light work with his hands, diminishes the weekly payments due to him under the memorandum of agreement by 3s. per week; Ordains the minuters (the appellants) to pay to the said John M'Kay the sum of 9s. 6d. per week, and that from and after the date of this deliverance: Finds M'Kay entitled to expenses," &c.

The questions of law for the opinion of the Court were:—"(1) Under section 11 of the first schedule appended to the Workmen's Compensation Act 1897, where a workman has been examined by a duly qualified medical practitioner provided and paid by his employers, and is dissatisfied with the certificate of such practitioner, and owing to his alleged inability through poverty to pay a fee, has not submitted himself for examination to the medical practitioner appointed for the purposes of the said Act for the district in which his case has arisen, does such workman's compensation fall to be suspended so long as he does not submit himself for examination to such medical practitioner appointed for the purposes of said Act? (2) In such circumstances, and there having been no medical evidence led before the Sheriff, was the Sheriff entitled to remit, under section 13 of the second schedule appended to the Act, and relative regulations, to a medical practitioner appointed for the purposes of the said Act to report as to the condition of the workman? (3) Was the report of the medical practitioner to whom the remit was made conclusive (1) as to the condition of the workman, and (2) as to whether the workman's incapacity arose from the injuries in respect of which compensation is claimed?"

Argued for the appellants—The appellants having got the certificate of November 7th 1902 that the respondent was fit for work were entitled under section 11 of the First Schedule of the Act to stop the weekly payments unless and until the

respondent submitted himself for examination by one of the medical practitioners appointed for the purposes of the Act. With a view to avoid the expense of litigation they had preferred to go on making the weekly payments, and to bring an application for review under section 12 of the First Schedule. They maintained, however, that the respondent's right to the payments was suspended as from November 7th 1902, and their first motion to the Sheriff was to that effect. Section 11 prescribed the manner in which in a simple way the condition of the workman could be definitely ascertained, and was designed to prevent the conflict of testimony and confusion which, as shown in *Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239, might result from a proof as to the workman's condition, and to provide an employer who has reason to believe that the workman was fit for work with a summary remedy—*per* Lord Adam in *Steel* v. *Oakbank Oil Company, Limited*, December 16, 1902, 5 F. 244, 40 S.L.R. 205. The employer had no power to compel the workman to submit to examination by a specially appointed medical man, but if the workman refused, section 11 in its last sentence prescribed that his right to the weekly payments should be suspended. There was no hardship to the workman in such suspension, for his remedy, if dissatisfied with the report of the medical man provided by the employer, was to submit himself for examination by a medical man appointed under the Act. The contention of the appellants had been upheld and was given effect to in *Davidson* v. *Mossend and Summerlee Iron and Steel Company, Limited*, June 10, 1903, 40 S.L.R. 764. The Sheriff was accordingly wrong in disregarding section 11, and making a remit under section 13 of Schedule II. The certificate of 7th November 1902 was not produced in the Sheriff Court, and objection was taken to proof because the only relevant fact was admitted, viz., the refusal of the respondent to submit to examination by a medical practitioner appointed under the Act.

Argued for the respondent—The first question in law for the opinion of the Court was in the circumstances of this case purely academic, as the appellants had continued to make the weekly payments. [LORD KINNEAR—The Sheriff has ordained a payment of 9s. 6d. per week, and neither party appealed against this decerniture, so that the only practical question is as to the intermediate payments since November 7th 1902.] The Sheriff was right in holding that the delay on the part of the respondent to submit himself to examination by a medical man appointed for the purposes of the Act, on the ground that he was unable to pay the fee, was not a reason for suspending the weekly payments. The Treasury, under Sched. II., sec. 13, of the Act, refused to pay the fee for examination to any medical man unless he had been specially appointed to report by the arbitrator. The option given under section 11 to submit to examination by a medical man appointed under the Act was an option given to the workman. The word was "may," not "shall." It was permissive, not imperative. A workman who had submitted to either of the two examinations contemplated in section 11 did not come within the provision at the end of section 11. The words "such examination" were satisfied by either the one or the other of the alternative modes of examination contemplated by the section. The respondent having submitted to examination by the medical man provided by the appellants had not "refused" or "obstructed" examination. The contention of the appellants involved that "may" should be read "shall," and "such examination" be read "both examinations." Section 11 must be read along with section 12 of the schedule. The procedure by application for review provided in section 12 of the First Schedule remained open and afforded a speedy remedy to the employer. The appellants had in fact followed that procedure, but they did not produce the medical certificate of November 7th 1902, and led no evidence, so that it was necessary for the Sheriff to remit to a medical referee under section 13 of the Second Schedule. In *Davidson* v. *The Summerlee Iron and Steel Company, Limited* (*cit. sup.*), the agreement between the employer and the workman as to compensation had not been recorded, and the question was whether he was entitled to arbitration. The circumstances of that case were accordingly different, and the opinions of the majority of the Judges had reference to these different circumstances.

At advising—

LORD M'LAREN—The facts are very clearly set forth in the case stated by the Sheriff, and I shall not re-state them, except in so far as necessary to explain my opinion. The respondent, who is a miner, in the month of February 1902 was injured in the course of his employment, and by agreement has received compensation at the rate of 12s. 6d. per week.

In November 1902 the respondent was examined by a medical practitioner provided and paid by the appellants, whose certificate was to the effect that the respondent was fit for work. The respondent intimated that he was dissatisfied with the certificate, but he did not avail himself of the power given by the 11th section of the First Schedule to the Act to submit himself for examination to one of the medical practitioners appointed under the authority of the Act, because of his inability, as he alleged, to pay the necessary fee.

On 9th February 1903 a memorandum of the agreement under which compensation has been paid was recorded in the register kept by the Sheriff-Clerk of the Lothians, and on 11th February an application for review was instituted by the appellants, on the allegation that the respondent's incapacity for work did not extend beyond 7th November 1902. The appellants, as I understand, offered no evidence in support of their application, and they objected to

an allowance of proof on the ground that the respondent not having submitted himself for examination by one of the medical referees appointed under the authority of the Act of Parliament had no other remedy under the Act. A medical certificate was tendered by the respondent. The Sheriff, considering that this certificate was not sufficient to enable him to dispose of the application, and being of opinion that the delay on the part of the respondent to submit himself for examination on the ground of alleged poverty did not necessarily terminate his right to compensation, made a remit (under the 13th section of the Second Schedule) to one of the medical referees under the Act, who reported (26th March 1903) that the respondent was still unfit for his usual employment, and was only capable of light work with his hands. The Sheriff accordingly diminished the weekly payment by 3s. per week, and awarded 9s. 6d. per week to the respondent from and after the date of this deliverance.

Before answering the special questions I propose to consider what are the rights and obligations of the workman with reference to medical examination under the 11th section. The enactment begins by stating that the workman shall, if so required, submit himself for examination by a duly qualified medical practitioner, provided and paid by the employer; but this obligation is subject to a double qualification—first, on the supposition that the workman may object to an examination "by that medical practitioner," and secondly, that he may be dissatisfied by the medical certificate following on the examination when communicated to him. In either case he may submit himself for examination by one of the medical referees appointed under the authority of the Act, whose certificate is declared to be conclusive evidence as to the condition of the workman.

If the enactment had stopped there, it is, I think, reasonably clear that a workman who submitted himself for examination by one or other of the medical gentlemen pointed out in that section had performed the duty laid upon him by the Act. The option to be examined by an official medical referee is an option given to the workman. If he does not avail himself of it he must submit himself for examination by the medical practitioner provided by the employer. In that event he loses the benefit of an official certificate, which would be conclusive evidence as to his condition, but he is not subjected to the disadvantage of having to accept as conclusive the *ex parte* certificate of the employer's medical referee. Failing agreement it would still be necessary to bring the weekly payment under the review of the sheriff or arbitrator for the purpose of determining the rate of compensation, and as in this application the certificate obtained by the employer would not be conclusive evidence of the condition of the workman, it follows in my opinion that the Sheriff would have to be satisfied on that subject either by a proof or by the opinion of an official medical referee as provided by the 13th section of the Second Schedule. Again, I think that a workman who had submitted himself for examination to one or other of the medical gentlemen pointed out by the 11th section could not be held to have obstructed an examination under that section.

But the section proceeds—"If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." The important words in that question are "such examination," and as a mere question of grammatical construction I think it must be taken that the word "such," which is a general word of relation, has for its antecedent the whole subject of medical examination as described in the section, and therefore if the workman has accepted one of the alternative modes of examination prescribed by the section he cannot be said to have either refused or obstructed the desired examination. When we look to the substance of the enactment this is, if possible, even more clear, because I cannot attribute to the Legislature the logical absurdity of first allowing the workman alternative modes of examination and then treating him as in default if he does not submit to both. I think that refusal to submit to "such examination" means refusal to submit to any examination as before provided. The penalty would, then, be incurred by a workman who would neither submit to examination by the employer's medical referee nor offer to pay the fee necessary to entitle him to examination by an official medical referee.

In the present case the respondent has submitted himself for examination by the employers' medical referee; he does not accept the certificate as a correct representation of his condition, but he says that he has not the means of obtaining an examination at his own expense; and the result, in my opinion, is that the application to the Sheriff must proceed on the footing that a certificate has been got which the employer may offer as evidence, but which is not conclusive evidence of the workman's bodily condition. If the certificate had been put in I think that the Sheriff, if he thought proper, might have remitted the question to an official medical referee; and as the certificate was not put in I think the remit to an official medical referee was the only way of informing himself open to the Sheriff.

There is another answer to the appellants' contention. The penalty prescribed by the 11th section is that in case of refusal or obstruction the right to weekly payments shall be suspended, but it is not said that the workman is to lose his right to have the weekly payment settled by review. On this point the section may be contrasted with the 3rd section of the same schedule relating to the initial examination after notice of an accident. Under section 3 the provision is that in case of refusal or obstruction the workman's right to compensation, "and any proceeding under this Act in relation to compensation," shall be

suspended until such examination takes place.

I am aware that in a recent case which came before the Second Division of the Court opinions were expressed by some of the Judges to the effect that the workman who in that case had submitted himself for examination by the employers' medical referee, but who had not applied to be examined by one of the official medical referees, was disentitled to arbitration. But in that case (*Davidson* v. *The Summerlee Iron and Steel Co.*) the conditions of the question were materially different from those of the present case. The agreement under which the workman was receiving compensation had not been recorded in the statutory register, and the workman was not in a position to enforce payment of the allowance which his employer had been paying. Accordingly, the case came before the Sheriff as an original application for an award of compensation. It is fair to say that as at present advised I do not think I should have agreed with the judgment that the application should be dismissed; but I only say so that I may not be thought to found too strongly on the difference in the conditions of the two cases. What I really found on is that the present case is an application for a review of a subsisting claim of compensation, and the cases are so far different that I think this Division of the Court ought to proceed on its own opinion of the combined effect of the 11th and 12th sections of the schedule.

In applying the results of my opinion to the questions put to us, I think that the first question is not so completely stated as to raise the question whether the Sheriff's award was according to the statute. But under this question we may find that in the circumstances stated the respondent's failure to submit himself for examination by one of the medical practitioners appointed for the purposes of the Act does not disentitle him to a proof in the application to the Sheriff for review. In my opinion the remit made by the Sheriff, and the decision following thereon, was within the powers of the Sheriff as arbitrator under the Act, and the second question should be answered in the affirmative.

It is unnecessary in my opinion to answer the third question, because there was no evidence before the Sheriff contrary to the report of the medical referee, and it is not said that there was any dispute as to the workman's physical incapacity being the result of the accident in question.

LORD KINNEAR—I have had the opportunity of reading the opinion given by Lord M'Laren, and I need only say that I entirely concur in it.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Find in answer to the first question in the case that in the circumstances stated the respondent's failure to submit himself to examination by one of the medical practitioners appointed for the purposes of the Act does not disentitle him to a proof in the application to the Sheriff for review: Answer the second question in the affirmative: Find it unnecessary to answer the third question, and decern," &c.

Counsel for the Appellants — Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Watt, K.C. —Wilton. Agent — C. Clarke Webster, Solicitor.

Friday, July 10.

FIRST DIVISION.

[Lord Pearson, Ordinary.

SOMERVELL'S TRUSTEE *v.* DAWES.

Husband and Wife — Divorce — Entail — Provisions in Favour of Wife—Effect of Divorce on Aberdeen Act Provision.

Held (1) that the wife of an heir of entail, by divorcing her husband, did not forfeit her right in a bond of annuity granted in her favour under the provisions of the Aberdeen Act, (2) that she was not entitled to payment of her annuity until after the death of her husband, and (3) that, notwithstanding a provision in the bond of annuity to the effect that it should not be placed on the sasine register during the lifetime of the heir of entail without his consent in writing, she was entitled to record the bond immediately on the divorce without such consent.

Entail—Disentail by Trustee in Sequestration—Interest of Next Heir—Entail (Scotland) Act 1882 (45 *and* 46 *Vict. cap.* 53), *sec.* 18.

Section 18 of the Entail (Scotland) Act 1882, providing for disentail by a creditor or trustee in sequestration, enacts, *inter alia*, "The Court shall . . . order intimation to be made to the heirs whose consents would be required or must be dispensed with by the Court in an application for disentail by the heir in possession, and in the event of any of the said heirs . . . refusing to give his consent, the Court shall ascertain the value in money of the expectancy or interest in the entailed estate of such heir, and shall ordain the heir in possession to grant a bond and disposition in security over the estate for the amount so ascertained in favour of such heir."

In an application for disentail at the instance of a trustee in sequestration, under the above section, it appeared that the life interest of the heir in possession was entirely absorbed in meeting charges on bonds which did not affect the fee of the estate. *Held* that the right of the nearest heir was limited to obtaining a bond and dis-