Nobody disputes that a share in a joint-stock company is attachable for the debts of a shareholder, and the only question is whether the proper diligence to attach it is arrestment or adjudication. I say that is the only question, because it has not been suggested that it can be reached by poinding, or that it is protected from attachment altogether. Now I think there is a series of decisions which would govern this case even apart from the decision in *Sinclair* v. *Staples*—I mean decisions to the effect that the interest of a partner in an ordinary copartnery is attachable by arrestment even although it may be said that there is no money due at that moment to the partner, and although upon an accounting it might be found that there was no balance in his favour. I should have thought these cases in point; but any doubt I should have had is entirely removed by the decision in *Sinclair* v. *Staples*, which is to my mind a decision directly in point, and which I think we are bound to follow.

LORD PEARSON was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Lorimer, K.C.—R. S. Horne. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for Defenders (Reclaimers)—Morison, K.C.—Hon. W. Watson. Agents—Webster, Will, & Co., S.S.C.

Saturday, February 1.

SECOND DIVISION.

(Together with Lords M'Laren, Pearson, and Dundas.)

[Sheriff Court at Stirling.

DONNELLY *v.* WILLIAM BAIRD & COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *Schedule I* (12)—*Workman's Refusal to Undergo Surgical Operation—Right to Further Compensation.*

An injured workman who refused to undergo a surgical operation, unattended with danger to life or health or with serious suffering, which according to the best professional opinion offered a reasonable prospect of the removal or at least relief of the incapacity from which he suffered, *held* (*diss.* Lords Stormonth Darling and Pearson) to have precluded himself from any right to receive further compensation under the Workmen's Compensation Act 1897.

This was an appeal by way of stated case from a judgment of the Sheriff-Substitute (MITCHELL) at Stirling in an arbitration under the Workmen's Compensation Act 1897.

The case stated—"This is an arbitration under said Act in which the Sheriff of Stirling, Dumbarton, and Clackmannan at Stirling was asked to review and end or diminish a weekly payment of 7s., of which the appellant was in receipt in virtue of an agreement entered into by the appellant and the respondents on 24th May 1904.

"On 9th January 1906 the then Sheriff-Substitute found that the appellant was still totally incapacitated as the result of injuries sustained by him while in the employment of the respondents, and entitled to the weekly payment of 7s. in virtue of the agreement before mentioned. On 9th April 1907 a minute was lodged by the respondents again asking the Court to review and end or diminish the weekly payment before mentioned, and on 1st June 1907 I found '(1) that the respondent (the present appellant), on or about 28th January 1903, lost the use of his left hand in consequence of injuries sustained by him while in the employment of the petitioners (the present respondents), and that respondent still continues to be without the use of said hand; (2) that by agreement between petitioners and respondent, entered into on or about 24th May 1904, respondent became entitled to compensation at the rate of seven shillings weekly during incapacity, and that payment thereof has been made to him up to the present time; (3) that respondent's loss of use of his left hand was and is caused by the removal from said hand of the third finger and of the top of the thumb, the existence of pain in the palm at or near the knuckle from which said finger was removed, and the curvature into the palm and permanent fixing in that position of the second finger; (4) that the respondent has been examined by five doctors, three of whom were asked to examine by petitioners, and that the said three doctors recommend that the crooked second finger should be removed at the knuckle, or the joint next the knuckle, and that a nodule in the palm of said hand, which they believe to be the source or centre of the pain complained of, should also be removed; (5) that said proposed operations are simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure, or altogether, use of his said hand for the purpose of his former work, viz., 'drawing,' that is pushing, guiding, or pulling hutches in a coal pit, or for manual work of some kind in or about a pit or elsewhere, and to enable him to earn the same wages as before the accident, or wages to some substantial amount; (6) that respondent is of good constitution and in sound general health; (7) that he has not undergone and refuses to undergo such operations; (8) that his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations; (9) that in these circumstances respondent is not entitled to refuse and ought to undergo said operations,'—and I continued the cause till 1st July 1907 that the respondent (now appellant) might intimate whether he was then willing to submit himself to said operations.

"On 25th July 1907, I, having further considered the cause, and in respect of respondent's (now appellant's) declinature to undergo the proposed operations, found that the compensation payable to him should then end, and granted order accordingly."

The question of law for the opinion of the Court was—"Whether the appellant by his refusal to undergo the operations has forfeited his right to receive further compensation?"

Argued for the appellant—The question should be answered in the negative, there being no sanction either in the Act itself or in the decisions for the proposition that a man who declines to undergo a surgical operation must forfeit his right to compensation. The contrary was held in *Rothwell* v. *Davies*, 19 T.L.R. 423, and an opinion to the like effect was given by Lord Adam in *Dowds* v. *Bennie & Son*, December 19, 1902, 5 F. 268, 40 S.L.R. 239. In *Sweeney* v. *Pumpherston Oil Company*, June 23, 1903, 5 F. 972, 40 S.L.R. 721, the compensation of a workman who refused to submit to an operation was, in fact, continued, and in *Anderson* v. *Baird*, January 15, 1903, 5 F. 373, 40 S.L.R. 263, Lord Young expressed a strong opinion against forfeiture, and the matter was kept open by the award of a nominal sum. The Act awarded compensation during incapacity; admittedly, if the incapacity was wholly the result of the workman's unreasonableness — *e.g.*, if he refused to follow a course of simple medical treatment which would effect a cure—he could not claim compensation. But ordinary medical treatment and surgical operations were in a totally different category—the latter always being attended with a certain amount of risk and being viewed with a legitimate feeling of aversion by the averagely intelligent working man. There was no finding here that the workman was unreasonable; on the contrary, there was, at anyrate, some ground for thinking that the opinion of the medical men who had examined him was not unanimously in favour of operation. In any view, the compensation could not be ended; at most it could only be reduced to what he would have received had the operation taken place. Operation or no operation he would always remain a maimed man.

Argued for the respondents—The Act only gave compensation for incapacity where the incapacity "resulted" from the injury or accident, not where, as here, it "resulted" from the workman's unreasonableness in refusing to adopt the ordinary method of cure. There was no logical distinction between medical and surgical treatment where, as here, the operation was a safe and simple one. The case was ruled by *Anderson* (*cit. supra*) and *Dowds* (*cit. supra*). *Sweeney* (*cit. supra*) was distinguishable, the Court being influenced by the report of Professor Annandale who disapproved of the operation, and in *Rothwell* the proposed operation was a dangerous one. The suggestion of reducing the amount of compensation to what would have been payable had the operation taken place was quite incompetent. The Act provided no machinery for such a course, and did not permit an arbiter to indulge in problematical estimates as to wage-earning capacity. By his refusal to submit to the operation the workman had made it impossible to ascertain what his wage-earning capacity might have been—*cf. Lochgelly Iron and Coal Company, Limited*, v. *Sinclair*, 1907, S.C. 3, 44 S.L.R. 2.

At advising—

LORD JUSTICE-CLERK—The facts necessary for the consideration of this case are (1) that by the accident suffered by the appellant his left hand was disabled, (2) that by agreement between him and the employers the respondent received compensation at the rate of 7s. weekly, (3) that he has suffered permanent loss of the third finger and part of the thumb, (4) that he still has pain at the stump of the removed finger, (5) that his second finger is fixed in a curved position into the palm. In this state of matters the respondents requested three medical men to examine the hand, and they and two other medical men examined the appellant. There is no statement in the case what was the opinion of these latter two medical men, the appellant not having produced their reports to the Sheriff. The three doctors employed by the respondents reported that in their opinion the second finger, or part of it, should be removed, and a nodule in the palm, from which they believed the pain proceeded, should be removed. They reported that the operations were of a simple and minor character, involving no appreciable risk or serious pain, and that what was proposed was likely to restore in large measure the use of the hand for work such as the appellant was accustomed to fulfil, or other pit manual work, enabling him to earn full or at least substantial wages, he being of sound constitution and good health.

I have thought it well in this short form to state the facts which have to be dealt with, for the question of law for decision in this case turns upon the view to be taken of them—do they or do they not justify the position taken up by the appellant, which is—"I decline to submit to any operation, and demand compensation in respect that my present condition is one of disablement."

The question whether a refusal to submit to skilled treatment for the restoration, whole or partial, of capacity for work is an unreasonable refusal, is necessarily a question of degree. For it cannot be maintained that no matter what be the severity of the operation recommended, or how great soever the risk to life or general health of the treatment, the workman loses right to compensation unless he brings himself to undergo the treatment and to take the risk. I think the sound view on this matter is well expressed by Lord Adam in the case of *Dowds* v. *Bennie and Son*, when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under

penalty, if he refuses, of forfeiture of his right to a weekly payment—*e.g.*, in the case where a serious surgical operation is proposed with more or less probability of a successful cure.

On the other hand, I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinarily manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion I find that I have used almost the terms which are to be found in the case of *Anderson* v. *Baird*. These two cases which I have referred to seem to me to practically rule this case. The appellant refuses to follow the course reported on by the medical men. He has brought no counter-evidence for the purpose of inducing the Sheriff to hold that the evidence led should not lead to findings in fact in accordance with that evidence. The Sheriff has found in fact in terms of that evidence, and has in consequence held in law to the same effect as was held in the cases of *Dowds* and *Anderson*. In that I am of opinion that he was right, and would therefore propose that the question in the case should be answered in the affirmative, except that I think the word "forfeiture" is an unfortunate one to use. A better form would be that used in *Anderson's* case, that the appellant "is precluded from further insisting on his claim for weekly payments."

LORD M'LAREN—I cannot say that I have found this case free from difficulty, but the difficulty is not so much in the finding a principle of decision consistent with the statutory provisions, as in applying the principle to the facts of the case before us.

There is of course no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment.

In order to test the principle of decision I will suppose a more simple case. A workman whose trade requires the perfect use of both hands—a watchmaker or an instrument-maker for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled, but he is advised that by breaking the bone at the old fracture and resetting it the use of his hand will be completely restored. I am supposing a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the Compensation Act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment, and that he was not entitled to further compensation.

Passing to the other extreme, it is easy to figure a case of internal injury where an operation if successful would restore the sufferer to health, but where the surgeon was bound to admit that the operation was attended with danger. In such a case it would be generally admitted that there was not only a legal but a moral right of election on the part of the injured person; and if he preferred to remain in his disabled condition rather than incur the risk of more serious disablement or death, it could not be said that his inaction disentitled him to further compensation.

In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident, is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power. I think that this statement is in accordance with all the decisions that have been given in similar cases, but in whatever way the condition is defined each case must be considered as a circumstantial case depending on the nature of the proposed operation and its probable results. I do not think that in principle any distinction can be taken between medical treatment and surgical treatment as regards the duty of the patient to co-operate with his professional advisers towards his own restoration to health and working capacity. The distinction only begins when an operation is proposed which may be attended with danger, or the results of which are not in the region of reasonable and probable success.

My difficulty in this case is that Donnelly not being a skilled workman, but a drawer of hutches in a coal-pit, I can imagine that the man might honestly believe that no operation on his hand would suffice to remove the sensitiveness to pressure that at present makes him unfit for hard work. This, however, is a point which could not be overlooked by the doctors who have been consulted as to his case, and they have given their opinion that the crooked finger and the nodule in the palm of the hand should be removed, and that the operation is likely "to restore to him in large measure or altogether the use of his hand for

the purpose of his former work," viz., drawing hutches.

In such cases a prudent and reasonable man will be guided by medical opinion rather than by his own fears; and, without saying that the case is absolutely clear, my view is that by refusing to submit to the operation the party has disentitled himself to further payments. Any difficulty I have felt in considering the case is almost entirely removed by the consideration that nothing but good can come to this young man from the operation. Even if his hand should continue to be too tender to be useful to him in drawing hutches, it will according to medical opinion be greatly improved, and so the man will be in a more favourable position for doing work in some other occupation where the use of the left hand is not so necessary as in the work of a drawer.

I am therefore for affirming the Sheriff-Substitute's determination.

The LORD JUSTICE-CLERK intimated that LORD LOW concurred with the LORD JUSTICE-CLERK and LORD M'LAREN.

LORD STORMONTH DARLING—I concur with my brother Lord Pearson. His view, and that as I understand of the rest of your Lordships, is that the question of law which the Sheriff has formulated is not quite accurately expressed, and that the proper result of his findings would not be to "forfeit" the appellant's right to receive further compensation. But even taking the case as fairly raising the question which probably the Sheriff intended to raise, viz., whether the workman by his refusal to undergo the particular surgical operation recommended by the three doctors who examined him at the request of the employers has disentitled himself from claiming further payments by way of compensation, I agree with Lord Pearson that the Sheriff's ninth finding is really a finding in law, and therefore not a finding on which the Sheriff is final. As I read the cases which were cited both in England and Scotland, I think it has never been decided, at all events in explicit terms, that a workman's refusal to undergo a surgical operation, even of a minor kind, can be visited with a practical denial of his right to further compensation.

In *Rothwell* v. *Davies* (1903) 19 Times L.R. 423, the English Court of Appeal negatived such a result. In *Dowds* v. *Bennie & Son* (1902) 5 F. 268, which was treated by the First Division as a case where the injury was comparatively slight and the treatment proposed simple and common (principally passive movements and massage) and therefore it was treated as one where the present condition of the limb was truly due to the injured man's own fault and neglect, yet Lord Adam, in delivering the leading judgment, said that cases might easily be figured of "a more or less serious operation" being proposed where it would be out of the question to say that the workman was bound to submit to it. Even in *Anderson's* case (1903) 5 F. 373, refusal to undergo a "simple operation" as disentitling the workman to a continuance of substantial compensation was (diss. Lord Young) avoided by allowing the matter to be kept open by only awarding him a nominal sum. Lastly, in *Sweeney*, 1903, 5 F. 972, refusal of the workman to undergo a surgical operation which had been recommended by the employers' doctors as disentitling him to further compensation was distinctly negatived in deference to a contrary opinion by a surgeon of eminence.

Therefore I think I am well founded in saying that there is not a single case in either England or Scotland laying down in explicit terms the rule for which the employer here contends, even with regard to a minor surgical operation, however probable the success of it may be. But as Lord Pearson and I are in a minority, it is unnecessary to consider what the practical consequences would be of giving effect to our view.

LORD PEARSON — [Read by the Lord Justice-Clerk]—I agree in the view that the question of law which the Sheriff has formulated is not accurately expressed, and that the proper result of his findings is not to "forfeit" the appellant's right to receive further compensation. But I desire to add that on the question which I think the Sheriff intended to raise, and which was fully argued to us, my opinion is entirely in favour of the appellant. I am clearly of opinion that the Sheriff's first seven findings in fact do not warrant the eighth finding, which is, that "the appellant's continued incapacity to use his left hand, and any continued pain in his left palm, are fairly attributable to the want of such operations." It appears to me that the principles laid down in the cases of *Dowds* and of *Sweeney* lead to the opposite conclusion, and that the Sheriff's ninth finding, that in these circumstances the appellant "is not entitled to refuse, and ought to undergo said operations"—which is really a finding in law—is not maintainable. I cannot hold the appellant to be unreasonable in his refusal to submit to the amputation of a finger. I admit, however, the difficulty of giving effect to this view, having regard to the terms of the eighth finding, which is a finding in fact, and is not before us for review, and which, when fairly construed, imports that the conduct of the appellant in refusing to submit to the operation is so unreasonable as to disentitle him to further compensation.

LORD ARDWALL—I am of opinion that the question of law submitted in this case should be answered in the affirmative, with the alteration suggested by your Lordship in the chair.

The compensation at the rate of 7s. a week which has hitherto been received by the appellant under an agreement entered into in terms of the Workmen's Compensation Act 1897, has been paid and received under the provisions contained in the first schedule of the said Act, section 1, (*b*) which apply to cases where "total or partial incapacity for work results from

the injury." It is stated by the Sheriff Substitute that certain simple and safe operations would remove the appellant's incapacity to work, and in the eighth finding it is stated that "the appellant's continued incapacity to use his left hand and knee, and any continued pain in his left palm, are fairly attributable to the want of such operations." Accepting this as a fact, it appears that now the appellant's incapacity for work does not result from the injury which he received in 1903, but from his refusal to submit to the said operations, and this being so, compensation is no longer payable in respect of incapacity for work resulting from an injury, and the payment thereof ought to come to an end.

But the appellant pleads that he is not bound to submit to the operations in question, and it was contended by his counsel that no person is bound to submit to an operation in such circumstances as the present against his will, however simple such operations may be, and that if a person in the position of the appellant chooses to take his stand on the ground that he objects to an operation on account of the pain or risk involved in it, he is the sole judge and ought not to be forced by the decision of a court of law into the alternative of either submitting to an operation or forfeiting the compensation which otherwise he is by law entitled to. This raises a question of general importance, but one which has not now to be considered for the first time.

Three cases involving this question have been already under consideration of the Court—*Dowds* v. *Bennie & Son*, 5 F. 268; *Anderson* v. *Baird & Company*, 5 F. 373; and *Sweeney* v. *Pumpherston Oil Company*, 5 F. 972. I think the result of these decisions is that no general rule can be laid down, but that each case must be determined upon its own circumstances, the questions for consideration in each case, generally speaking, being (1) Whether the operation is a simple or a difficult one? (2) Whether it is attended with serious risk? (3) Whether if performed it will attain the end in view by diminishing or putting an end to the injured person's incapacity for work? (4) Whether it is or is not an operation involving much pain, and if it does involve much pain whether there is serious risk to be encountered by the use of anæsthetics during the operation. And (5) What is the opinion of medical men as to the advisability of the operation?

Now in the present case the Sheriff-Substitute has found (1) the "proposed operations are simple or minor operations;" (2) that they are "not attended with appreciable risk;" (3) that they are "likely to restore to respondent in large measure or altogether use of his said hand for the performance of his former work;" (4) that the proposed operations are "not attended with . . . serious pain," and that the respondent is of good constitution and in sound general health, from which I infer that there would be no danger to him from the use of anæsthetics; (5) that "the respondent has been examined by five doctors, that three of these doctors recommend that the operations should be performed." Nothing is said with regard to the other two doctors who examined the respondent at his own instance and I therefore conclude that it must be taken upon the facts as stated that these doctors either did not express any opinion or that if they did their opinion was that they could not state any objections to the operations proposed.

In these circumstances I am of opinion that the Sheriff-Substitute has come to a sound conclusion on the facts of the case; that the appellant has shown no reasonable cause why he should not undergo the operations in question; and that his refusal to do so disentitles him to a continuance of the compensation which he has hitherto received.

LORD DUNDAS—I agree with the majority of your Lordships. The real point at issue in each case of this kind is, I apprehend, whether the workman's incapacity arises from the accident which befel him or only from his own subsequent unreasonable conduct. If the latter is the fact, the workman must take the consequences of his conduct. I think we must assume from what is set forth in this stated case that there was no conflict of opinion among the medical men consulted on both sides as to the nature or the probable effect of the proposed operations. Now, the Sheriff-Substitute has found, among other things, that these are "simple or minor operations, not attended with appreciable risk or serious pain, and operations likely to restore to respondent in large measure or altogether use of his said hand for the purpose of his former work"—which was of a very simple nature; that the respondent "is of good constitution and in sound general health;" and that "his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations." In this state of matters, it appears to me that a reasonable man would submit to these operations; and that, as the respondent deliberately declines to do so his conduct is unreasonable, and his compensation must be ended. I agree, therefore, with the conclusion at which the Sheriff-Substitute has arrived; but I agree with your Lordships in thinking that the question stated for our determination is not as it stands in proper form.

The Court pronounced this interlocutor—

"Find in answer to the question of law stated that the appellant has by refusing to undergo the operation to his left hand precluded himself from any right to receive further compensation: Therefore answer said question of law in the affirmative: Affirm the dismissal of the claim by the arbitrator."

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

Counsel for the Respondents—Horne—Strain. Agents—W. & J. Burness, W.S.