neck in street 6·15 p.m. to-night. Local police informed immediately. Will you set your own detectives to work?" And then that is followed by a confirming letter —"In confirmation of my wire of to-night I greatly regret to report that my wife's pearls were snatched from her to-day in the circumstances explained in the enclosed statements." Then the two statements are enclosed in that letter. They do not say anything about asking for money, but they give an account of the robbery in the street. I do not read them again, because they have been read before. Then there is a letter of 14th February, which is after Mr Leach had been down—"My dear Mr Munt—We are disappointed at the result of your man's visit. He only stayed one day, and seemed even sceptical because the thing seemed so wonderful. My solicitors here, Dundas & Wilson, who keep the police up to the mark and take charge of my papers, would very much like a copy of the policy just for form. May I have one please?" And he gets the copy of the policy. The last letter is the one in which he says that Mr Munt is quite right in his story, and then he says—"We will now be able to show our hand more or less, and if necessary declare war." Well now, you are entitled to take all those communications into consideration, and you are entitled to consider what is the true meaning of them. You do not, as a rule, write to an insurance broker to say that there has been a theft without a view of following it up by making a claim. Mr Munt is not the actual representative of the underwriters, as counsel were quite right in saying, but still there you are, and that is how the matter rests. Assuming that you find that there is a conspiracy at all, you have to consider whether what was done had got beyond the stage of preparation into the stage of perpetration.

Theoretically speaking, there are four verdicts that you might find. You might find both the accused innocent, you might find both guilty, you might find one innocent and the other guilty, and *vice versa*. But practically there are only three. You may find them both innocent, and you may find them both guilty, but on the facts as presented it would be impossible to find Mrs Cameron innocent and Lieutenant Cameron guilty. You see it for yourselves. I explained to you at the beginning about concert, and how concert affects the liability of each for the actual acts of the other, and concert may be gathered from what is proved at any stage of the proceedings. You may get it by inference from something that only happens at a very late stage of the day. You do not need to find it at first. The law draws no distinction between before and after the fact, but it must be by inference, because it is not given to anyone to pry into the human heart and to know what is the state of motive and what is the state of intention. But at the same time—and please remember this—the inference must be only drawn from proved facts. It is no inference to say "Oh, I think it was probably so. I think it must be so." There must be something proved from which that inference is drawn. Now Mr Morison in his very able speech went perhaps a little too far when he said that each was only answerable for the particular thing that was proved against them, but in the main he was right. You have got here, of course, necessarily first to consider the case of Mrs Cameron. If you think she is innocent, then there is no difficulty whatever with Lieutenant Cameron. If you think she is guilty, then so far as he is concerned it depends entirely on whether you think there was concert. If there was concert, and Lieutenant Cameron was party to the scheme, then he is equally guilty even although there were certain parts of the scheme which he had no active hand in carrying out. If what he really did was that at a late period, that is to say, after the simulated theft, he only knew then and did what he did do after that time to screen his wife, then no doubt he has been guilty of an offence against the law, for it is an offence against law to screen the guilty. It is an offence which in circumstances like these there are few who would find the heart to blame him for, but at any rate it is not the offence with which he is charged under this indictment.

The jury unanimously found both accused guilty, and they were sentenced to three years' penal servitude.

Counsel for the Panel Cecil Cameron—Morison, K.C.—Kemp.

Counsel for the Panel Ruby Cameron—Clyde, K.C.—M. P. Fraser. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Crown—Sol.-Gen. Hunter, K.C.—A. M. Anderson, K.C., A.-D.—Lyon Mackenzie, A.-D. Agent—W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Tuesday, May 30.

SECOND DIVISION.

[Sheriff Court at Airdrie.

M'GHEE *v.* SUMMERLEE IRON COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1), *and First Schedule* (16)—*Review of Weekly Payment—Onus probandi—Certificate by Medical Referee of Workman's Fitness for Work—Supervening Incapacity.*

A miner sustained injuries by an accident arising out of and in the course of his employment. On 14th February 1910 the medical referee, to whom the matter of his fitness for employment had been remitted, reported that he was fit for his work. Thereafter his employers made application to have the

compensation ended as on 14th February 1910, or some subsequent date, or alternatively diminished. The workman maintained that since the date of the referee's examination he had become, and would be for the future, unfit for his work. The Sheriff found, after proof, that the miner was totally incapacitated, but it was not proved that this condition was due to the effects of the accident, and held that the *onus* of proving that the supervening incapacity was due to the accident lay upon the miner.

Held that the *onus* was upon the miner.

M'Callum v. *Quinn*, 1909 S.C. 227, 46 S.L.R. 141, *distinguished.*

This was a Stated Case on appeal from the Sheriff Court at Airdrie against a decision of the Interim Sheriff-Substitute (MILLAR CRAIG) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap 58), between John M'Ghee, miner, Airdrie, *appellant*, and the Summerlee Iron Company, Limited, Coatbridge, *respondents.*

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which the Sheriff is asked to find that the appellant's right to compensation under the Workmen's Compensation Act 1906, in respect of an accident arising out of and in the course of his employment with the respondents at Dunsyston, Chapelhall, on 22nd June 1909, ceased on 14th February 1910, or at such subsequent date as to the Court may seem just, or alternatively to grant an award of partial compensation from such date or dates as to the Court may seem just, and to find the appellant liable in expenses. On 22nd June 1909 the appellant sustained injury to his right eye resulting in the loss of the sight of the eye, by an accident arising out of and in the course of his employment as a miner with the respondents in their said colliery. On 14th February 1910 Dr A. Maitland Ramsay, one of the medical referees appointed to act for Lanarkshire under the said Act, to whom the question of the appellant's fitness for work was remitted under section 15 of Schedule 1 of the Act, reported as follows—'(1) The said John M'Ghee is to all intents and purposes blind in his right eye, but the condition of the left is perfectly satisfactory, and his condition is such that he is fit to work as a miner. (2) The incapacity of the said John M'Ghee was due to the injury sustained on or about the 22nd June 1909.'

"Thereafter the respondents presented a petition craving the Court to find that the appellant's right to compensation ceased on 14th February 1910, or such subsequent date as to the Court might seem just, or alternatively to grant an award of partial compensation. Defences were lodged by appellant in which they averred, *inter alia*, that since the date of the medical referee's examination the appellant's sight had diminished, and that he was then, and would be for the future, unfit for his work. Proof having been allowed, the parties lodged a joint-minute agreeing that medical reports lodged therewith should be held as the proof in the case, and craving the Court to remit the case again to the medical referee. On 13th October 1910 the Sheriff-Substitute (GLEGG), in respect of the conflict in the medical evidence, remitted under section 15 of Schedule 2 of the Act to Dr A. Maitland Ramsay. The questions submitted to the medical referee and his answers were as follows—'*Ques.* 1. Has M'Ghee again become incapacitated since the date of your examination on 14th February 1910, when you certified him as fit for his former work as a miner?—*Ans.* 1. M'Ghee is again incapacitated and unfit for his former work as a miner. *Ques.* 2. If so, is M'Ghee fit for any kind of work?—*Ans.* 2. M'Ghee is fit for work on the surface. *Ques.* 3. In the event of M'Ghee being certified unfit for work, is the unfitness the result of his accident?—*Ans.* 3. I cannot say whether or not M'Ghee's present incapacity is the result of his accident.'

"This report was dated 18th October 1910. After hearing parties on the foregoing questions and answers by the medical referee, I issued an interlocutor allowing parties to lead further proof on the questions (1) whether the appellant is incapacitated, and (2) whether the incapacity, if any, is due to the accident.

"In terms of said interlocutor, proof was led on 19th December 1910, before Dr A. Maitland Ramsay as medical assessor and myself as arbitrator, when the appellant adduced two medical witnesses, who gave evidence to the effect that the appellant's present incapacity for work was due to the original accident, while the respondents led no evidence, but relied on the medical certificates previously lodged by them.

"On 10th January 1911 I issued an interlocutor, in which I found that the following facts, *inter alia*, were admitted or proved—(1) That in terms of the medical referee's report, the appellant's incapacity had ceased on 14th February 1910. (2) That on 13th July 1910 the appellant was again totally incapacitated in consequence of partial loss of sight in the remaining eye—the left. (3) That on 18th October 1910 the appellant was partially incapacitated, but was fit for work on the surface. (4) That the appellant is now totally incapacitated by reason of the condition of his left eye. (5) That it is not proved that the said condition is due to sympathetic affection.

"On these facts I *held*—(1) That the *onus* lay on the appellant to prove that the incapacity which supervened in consequence of the partial loss of sight in the left eye was due to the accident; (2) that he had failed to discharge that *onus*. Had I held that the *onus* lay on the respondents to prove that the appellant's supervening incapacity was not due to the accident, I should have held that the respondents had not discharged that *onus*. I therefore ended the compensation as at 14th February 1910, and found no expenses due to or by either party.

"The *question of law* for the opinion of

the Court is—'Was I right in holding that the *onus* of proving that his supervening incapacity was due to his accident was on the appellant?'"

Argued for appellant—The Sheriff was wrong. There was a continuing liability to pay compensation. The *onus* accordingly lay on the employer, who was seeking to upset the contract. He must show cause why compensation should be ended —*M'Callum* v. *Quinn*, 1909 S.C. 227 (Lord M'Laren at 228), 46 S.L.R. 141. It required to be established affirmatively by proof that the workman's present incapacity was not the result of the original accident. (2) *Esto* that the *onus* was on the workman, it had been discharged. At the proof there was no evidence to support the Sheriff's conclusion. The evidence was all in the workman's favour. The Sheriff had proceeded entirely contrary to evidence—see *Mackinnon* v. *Miller*, 1909 S.C. 373 (Lord President at 378), 46 S.L.R. 299; *Sneddon* v. *Greenfield Coal and Brick Company, Limited*, 1910 S.C. 362, 47 S.L.R. 337.

Argued for respondents—The Sheriff was right. The employer was, in the first instance, pursuer in the issue when he made application that compensation should be stopped—*Baker* v. *Jewell*, [1910] 2 K.B. 673. It was enough for him to prove that incapacity had ceased at the time of application. The arbiter was then entitled to terminate the weekly payment as from the date of the application—*Donaldson Brothers* v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920. It was no doubt true that the medical referee's certificate by itself did not bar a future application if there was supervening incapacity—*King* v. *United Collieries, Limited*, 1910 S.C. 42, 47 S.L.R. 41. The workman must, however, prove that the supervening incapacity was due to the original accident. He must satisfy the requirements of section 1 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), just as if he were making an original application. The case of *M'Callum* v. *Quinn* (*cit. sup.*) was different. The employer there had not proved that incapacity had ceased. He had not discharged the *onus* under section 15 of the first schedule of the Workmen's Compensation Act (*cit. sup.*).

LORD DUNDAS—In this stated case under the Workmen's Compensation Act the circumstances are rather peculiar. It arises out of an application by the employers to end or diminish compensation. It appears that on 22nd June 1909 the workman M'Ghee sustained injury by an accident admittedly arising out of and in the course of his employment. It is not stated, but it was not disputed, that compensation at a certain rate was fixed and received by him for some time thereafter. It is not clear, but I do not think it is material, whether he was paid under a decree or by agreement. On 14th February 1910 Dr A. Maitland Ramsay, one of the medical referees appointed under the Act, to whom the question of M'Ghee's fitness for work was remitted under section 15 of Schedule I, reported that the man was to all intents and purposes blind in his right eye, that the condition of his left eye was perfectly satisfactory, that his condition was such that he was fit to work as a miner, and that his incapacity was due to the injury on 22nd June 1909. This report is of course conclusive evidence that, as at 14th February 1910, M'Ghee was fit to work as a miner. The case proceeds to state that "thereafter"—we do not know the precise date, but I do not think it is very material to know it; it was some time after 14th February 1910—the employers presented this application, craving the Court to find that the appellant's right to compensation ceased on 14th February 1910 or at some subsequent date, or alternatively to diminish the amount. I pause to observe, first, that it clearly lay upon the employers to show that incapacity had ceased; and second, that they so far discharged that *onus* by producing the report to which I have alluded, conclusive as at its date of the man's fitness to work as a miner. Defences were lodged by the appellant, and he said that since the date of the medical examination his sight had diminished, and that he was then, and would be for the future, unfit for his work. Proof was allowed, and the parties put in a joint-minute agreeing that medical reports lodged therewith should be held as the proof in the case, and craving the Court to remit the case again to the medical referee. On 13th October 1910 Sheriff Glegg, as arbiter, in respect of the conflict in the medical evidence, remitted to the same referee, Dr Maitland Ramsay, whose report, dated 18th October, is embodied in answers to certain questions put to him, as follows—[*Quotes, v. sup.*] After hearing parties on these questions and answers by the medical referee, the Sheriff-Substitute (Millar Craig) allowed further proof on the questions—"(1) Whether the appellant is incapacitated? and (2) whether the incapacity, if any, is due to the accident?" Proof was led on 19th December 1910 before the Sheriff-Substitute, with the medical referee as medical assessor, when the appellant adduced two medical witnesses, who gave evidence to the effect that the appellant's present incapacity for work was due to the original accident, while the respondents led no evidence, but relied on the medical certificates previously lodged by them, as I understand, in October.

I should here mention that Mr Black, founding upon the paragraph I have just summarised, complained strongly that injustice had been done by the Sheriff-Substitute, because he apparently gave no effect to the evidence of the two medical witnesses for the appellant. In the first place, that matter does not seem to me to be raised in the case as it has been stated to us, or by the question which is put to us. But apart from that, I do not think that there is really anything we can take hold of as indicating in any degree that there was a miscarriage of justice. It was for the arbiter to satisfy himself upon the evidence

put before him, and to make his findings accordingly. It is no part of our duty to know what weight, if any, he attached to the evidence of the appellant's medical witnesses. Having had the assistance of the assessor, and having considered all the evidence before him, he proceeded to issue findings, and it is upon these and these alone, I think, that we can proceed in this case.

The Sheriff-Substitute found (1) that in terms of the medical referee's report, the appellant's incapacity had ceased on 14th February 1910; (2) that on 13th July 1910 the appellant was again totally incapacitated in consequence of partial loss of sight in the remaining eye, the left; (3) that on 18th October 1910 the appellant was partially incapacitated, but was fit for work on the surface; (4) that the appellant is now totally incapacitated by reason of the condition of his left eye; and (5) that it is not proved that the said condition is due to sympathetic affection. The Sheriff-Substitute considered—and I agree with him—that it is of vital importance to the decision of the case to determine upon which party lies the *onus* of proof upon the matter involved in his fifth finding. He held that the *onus* lay on the appellant—that is, the workman—to prove that the incapacity which supervened in consequence of the partial loss of sight in the left eye was due to the accident, and that he had failed to discharge that *onus*, and he explained that if the *onus* truly lies the other way he would have held that the respondents had not discharged it. It therefore comes to this, that neither party has, in the arbiter's opinion, adduced conclusive evidence one way or the other upon that vital issue. In accordance with his view of the legal burden of proof, the Sheriff-Substitute ended the compensation as at 14th February 1910, and found no expenses due to or by either party. The question put to us is—[*Quotes, v. sup.*].

I have come to the conclusion that the question must be answered in the affirmative, because I think the Sheriff-Substitute was right in his view as to the incidence of the *onus probandi*. It is, no doubt, true that when a master presents an application to have compensation ended or diminished, the *onus* is upon him to show that incapacity had ceased in whole or in part. Here the master was able to produce along with his application the finding of the medical referee, conclusive at its date, that on 14th February 1910 the man was fit for his work as a miner. I think the *onus* then fell upon the workman to show that the supervening incapacity was due to the original accident, just as in an original application he must show that his injury was due to an accident arising out of and in course of his employment. At first I was impressed by the case of *M'Callum* v. *Quinn* (1909 S.C. 227) as being an authority to the contrary effect. I was a party to that decision, and on looking at it again I find nothing in what was said by any of the Judges from which I wish to differ. But I think the case is materially different from the present one, and therefore forms no obstacle to the decision I am proposing. In *M'Callum's* case the employer had in no way proved that the incapacity had ceased, and did not produce any report by a medical referee. Here the master supported his application by the production of a certificate, which as I think shifted the *onus* to the workman to show that the supervening incapacity was truly due to the accident, and this, according to the arbiter's judgment, he has not been able to establish.

I confess to feeling a certain degree of sympathy with this man in the circumstances disclosed; but after all one does not know the whole facts, and besides, sympathy cannot affect our judgment. For the reasons stated I advise your Lordships to answer the question in the affirmative.

LORD SALVESEN—I am entirely of the same opinion. The only question stated for our opinion is the question upon whom the *onus* lay of proving the cause of this man's supervening incapacity. The employer started with a medical certificate, which is made conclusive by the Act as of its date, and that medical certificate was to the effect that M'Ghee was fit for work as at 14th February 1910. Now this question might have arisen a long time after the granting of the medical certificate, and after the miner had acquiesced in the stoppage of the payments that he had previously received. Is it to be said that notwithstanding a medical certificate so obtained from the competent authority, it is the duty of the employer when there is supervening incapacity to prove that that incapacity did not result from the original accident? It would be very hard if that were so, because it would be very difficult in many cases for the employer to discharge such an *onus*. He has no knowledge of the subsequent history of the man; he may have ceased to be in his employment and be earning wages elsewhere. Therefore if we adopt the argument submitted to us by Mr Black, I think we are driven to the conclusion that the certificate of the medical referee was of no value to the employer except as an item of evidence, which could be rebutted. I do not think that is the position of matters, for the certificate of the medical referee is conclusive evidence of the man's fitness for work as at the date when it was granted.

The subsequent history of this litigation has been fully gone into by your Lordship in the chair. The result of the Sheriff's judicial consideration of the matter is that he cannot find it proved that the supervening incapacity was connected in any way with the accident. Now if the *onus* is upon the appellant to furnish that proof, then he has failed to furnish it. It may be his misfortune, but I concur with the Sheriff-Substitute in holding that in the circumstances of this case the *onus* of proof of that essential matter was upon the appellant, and that it was not the duty of the employer to prove the negative. I

agree with your Lordship that this case is distinguishable from that of *M'Callum*, 1909 S.C. 227. As regards the case of *King*, 1910 S.C. 43, it too has no application, because although there was a certificate from a medical referee there, all that was held was that it did not bar the workman, when subsequent proceedings were taken by him for an award of compensation in respect of supervening incapacity, from proving that he had become incapacitated as the result of the original accident. Accordingly, that case is entirely consistent with the judgment which we now pronounce.

LORD GUTHRIE—I agree. In the ordinary case the first medical report usually finds incapacity; in this case the first medical report which we have finds capacity. It seems to be clear that when the employer, following on that report, presented an application for review, it was sufficient for him to table that report as proof of capacity existing at its date. The appellant was quite entitled to rejoin that the capacity had subsequently ceased, and that it had ceased on account of some reason connected with the accident. The Sheriff's question assumes that the *onus* lay on the appellant to prove that the capacity referred to in the doctor's report had ceased, and only puts to us the question whether, assuming that *onus* to have been discharged, the further *onus* of proving that the supervening incapacity was due to the accident was also on the appellant. It appears to me, on a consideration of the statute, and in particular of the words of the first section, that the workman is bound, as a condition of claiming compensation, to connect the incapacity from which he suffers with the accident which arose out of his employment, and that this is so whether the question arises when the claim is first made or in subsequent proceedings. I therefore entirely concur in the judgment proposed.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Morison, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

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

Wednesday, June 7.

SECOND DIVISION.

[Sheriff Court at Inverness.

MACGILLIVRAY *v.* THE NORTHERN COUNTIES INSTITUTE FOR THE BLIND.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII. c.* 58), *sec.* 13—*Workman.*

A blind man was injured while employed in the industrial department of an institute for the blind. This department was supported partly by charitable contributions received by the institute. The institute gave the man, in respect of his services, board, lodging, and 5s. a month, and received on his account charitable and parochial assistance which came to a few pounds less than the amount it expended on him. *Held* that the man was a workman within the meaning of the Workmen's Compensation Act 1906.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII. cap.* 58), *First Schedule*, 1 (*b*)—*Compensation—Amount.*

In an arbitration under the Workmen's Compensation Act 1906, when the workman was paid partly in money and partly in kind by a charitable society which received parochial and charitable assistance on his account, the arbitrator stated that there was no evidence as to his weekly earnings save the statement by the officials of the institute that the money payments represented twenty per cent. of the man's earnings. The Court *remitted* to the Sheriff to allow compensation on that basis.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts, sec. 13—"'Workman' . . . means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing. . . ."

First Schedule (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 . . . [or] . . . for any less period during which he has been in the employment of the same employer."

John MacGillivray, labourer, Inverness, having claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Northern Counties Institute for the Blind, Inverness, the matter was referred to the arbitration of the Sheriff-Substitute at Inverness (GRANT), who assoilized the defenders, and, at the request of the appellant, stated a case for appeal.