pubes, Inglis (afterwards Lord President) for Sir Kenneth proposed to sist him now with a curator *ad litem*. This the Court regarded as necessary and proper, and allowed to be done.

3. *M'Conochie*, 1847, 9 D. 791. A minor raised action, without the concurrence of her father as her administrator-at-law, which had been refused. It was held that as the minor was entitled to have her case brought before the Court, and her father refused to protect her interest, a curator *ad litem* should be appointed.

4. *Mitchell*, 1864, 3 Macph. 229, and *Walker*, 1867, 5 Macph. 858. A pursuer after having raised action and reclaimed became insane before the reclaiming note was heard. On the defender's motion a curator *ad litem* was appointed, and in *Walker's* case this was followed by the appointment of a *curator bonis* after the action was concluded.

5. *Dingwall*, 1871, 9 Macph. 582, 8 S.L.R. 385. Illustrates the position in which a pupil who has no tutor ought to find himself when he becomes major, where he has been cited as defender in an action, and which would be interfered with by the appointment of a tutor *ad litem*, at the instance of a pursuer or *quasi* next friend.

6. *Studd*, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566. In this case an English landed proprietor had also a heritable estate in Scotland. He executed a settlement in strict entail in English form of his English estate, but included also under general terms his Scottish estate. After his death his son and heir under the English deed raised action in the Scottish Courts against his own pupil son, who was the next heir, to have it declared that the English deed was inept to affect with fetters the Scottish heritage. On the case being brought into Court, application was made to the Second Division for the appointment of a curator *ad litem* to the pupil defender. While this application was granted, and funds supplied by order of the Court, both in this Court and in the House of Lords, to the curator *ad litem* to enable him to maintain the pupil's defence, I can say, as counsel in the case, that the propriety of appointing a so-called curator *ad litem* to a pupil defender was never brought before or considered by the Court.

7. Reference may also be made to the Entail Acts. The Rutherfurd Act of 1848, section 31, makes *special* provision for the appointment in petitions for disentail, &c., of a tutor or curator *ad litem*, or *curator bonis*, or other guardian to any party under age or subject to legal incapacity, whose consent is required, who shall be charged with the interest of such party in reference to such application, and shall be entitled, with or without consideration, to act and give consent on behalf of such party. See also the Entail Acts of 1853, section 18, and 1882, sections 12 and 13. It was thus evidently considered that such tutor or curator *ad litem* required special statutory authority to act on behalf of and so as to bind his ward.

I cannot conceal that I have myself, having been brought in contact with the question as counsel and judge from *Studd's* case onwards, come to hold the opinion that there is something not merely anomalous, but radically inconsistent in our law and practice in this matter, and I submit to your Lordship the propriety of having it practically reconsidered when occasion occurs. It may be that the correction of the inconsistency and the bringing the law and practice as regards pupils in line with that as regards minors may best be attained by raising the tutor *ad litem* into the position of a factor *loco tutoris ad hoc*, though the question would then arise, have the Court *ex nobili officio* power to do so.

The Court refused the motion.

Counsel for the First and Second Parties—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Saturday, June 12.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GRACIE *v.* CLYDE SPINNING COMPANY, LIMITED, *et e contra.*

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule II* (15)—*Remit by Arbiter to Medical Referee—Evidence Insufficient on Matter Material to a Question Arising in the Arbitration—Report by Referee beyond Terms of Remit—Statutory Rules and Orders, 27th June* 1907, *Part V* (20).

In an arbitration under the Workmen's Compensation Act 1906, in which the employers sought to have the weekly payments ended or diminished on the ground that incapacity was due, not to the injury, but to the unreasonable conduct of the workman in refusing to undergo an operation, the arbiter, after hearing medical evidence on the condition of the workman, the nature of the suggested operation, and its probable results, found that there was no evidence as to whether or not there was any special risk to the workman in the use of anæsthetics, and remitted to a medical referee to examine the workman and report on this point. The referee in his report, after dealing with the question of anæsthetics, stated that he thought "an operation would be of little benefit, and that the injury to the hand is permanent."

Held (1) that the remit was competent, as the point as to anæsthetics was not a separate question, but an insufficiency of the medical evidence on a material matter, and (2) that the arbiter must consider the whole report, and was not entitled to disregard the referee's expressed opinion on the benefit of an operation.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Review of Compensation—Unreasonable Conduct of the Workman in Refusing to Undergo Operation.*

Circumstances in which *held* (recalling the judgment of the arbiter) that a workman's continued incapacity was not due to his unreasonable conduct in refusing to undergo an operation.

Per Lord President—"For my part I am prepared to hold that, save in very special circumstances, the proximate cause of incapacity can never be the unreasonable refusal of a workman to undergo an operation if his own medical adviser advises him against undergoing that operation."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II (15), enacts — "Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to a question arising in the arbitration."

The Statutory Rules and Orders, June 27, 1907, Part V (20), enact—"Before making any reference the committee, arbitrator, or sheriff shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter."

The Clyde Spinning Company, Limited, Arthur Street, Bridgeton, Glasgow, applied in the Sheriff Court at Glasgow for review of the compensation payable to Margaret Gracie, carder, 33 Mill Street, Bridgeton, Glasgow, in respect of injury sustained by her by accident arising out of and in the course of her employment with them. They alleged that her incapacity was due, not to the injury sustained by her, but to her unreasonable conduct in refusing to undergo a minor operation. The Sheriff-Substitute (MACKENZIE), as arbiter, diminished the weekly compensation payable. Both parties were dissatisfied, and Cases for appeal were stated.

The Case at the instance of the *Employee* stated — "The appellant on or about 15th April 1914, while in the employment of the respondents in their spinning-mill at Arthur Street, Bridgeton, Glasgow, met with an accident involving injuries to four fingers of her right hand. A memorandum of agreement between the parties was recorded at Glasgow on 10th June 1914, in terms of which the respondents agreed to pay the appellant compensation at the rate of 6s. per week.

"On 5th October 1914 the respondents, on the averments that the wounds to the appellant's fingers were then healed, and that any incapacity she was then under was and had for some time past been due to her unreasonable conduct in refusing to undergo a minor operation to restore in a large measure, or altogether, the use of her hand by freeing the scars which in their then state prevented free extension and flexion of the fingers, craved the Court to end or diminish the weekly payments to the appellant under said memorandum of agreement as from the date of said application and to find the respondents entitled to expenses.

"The appellant in answer to said application averred that it was incompetent and irrelevant. She admitted that the wounds on her fingers were healed, but denied that her then incapacity was due to her unreasonable conduct in refusing to undergo a minor operation to recover the use of her hand. She explained that such an operation as the respondents wished her to undergo was not a minor operation but a very delicate one, and that there was no guarantee that it would have any beneficial effect on her hand, but would rather tend to leave the hand in a worse condition than before the operation. I heard parties' procurators on the relevancy, which question was raised on the report by the respondents' doctor, which was lodged in process, and before answer allowed a proof.

"The application was heard and proof led before me on November 27, 1914, at which John Barlow, M.D., one of the medical referees appointed under said Act, sat with me as assessor, when the following *facts* were established: — 1. That the appellant is a carder, residing at 33 Mill Street, Bridgeton, Glasgow, and the respondents are the Clyde Spinning Company, Limited, Arthur Street, Bridgeton, Glasgow. 2. That the appellant on 15th April 1914, while in the employment of the respondents, met with an accident arising out of and in the course of her said employment by having her hand caught in the fluted roller of a carding machine, by which the fingers have been rendered stiff and are maintained in a semi-flexed position. 3. That the appellant was incapacitated for work by said accident from its date. 4. That an operation for the purpose of freeing the scar so as to permit extension and flexion would probably have the effect of restoring the appellant's hand in a large measure to its former usefulness. 5. That the appellant refuses to undergo said operation on the advice of her doctor, who advised her against doing so. 6. That said operation is a minor one, and not attended with more risk than is involved in all operations; that there is a reasonable prospect of its diminishing or putting an end to the appellant's incapacity. 7. That said operation involves the use of anæsthetics.

"I found that it had not been established by the evidence led whether or not there was any special risk in the case of the appellant in the use of anæsthetics. I therefore, *in hoc statu*, under the provisions of Schedule II, paragraph 15, of the Act, remitted to David Newman, M.D., one of the medical referees under said Act, to examine the appellant, and to report whether there would be any risk to appellant more than ordinary in her having to undergo an operation under anæsthetics. Dr Newman reported as follows—'I examined Margaret Gracie to-day, and find her to be suffering from an injury to the right hand, as described in the medical reports. The risk of

taking an anæsthetic is not more than ordinary, but I consider that an operation would be of little benefit, and that the injury to the hand is permanent.'

"I heard parties' procurators on said report, and at the debate I was asked on behalf of the respondents to disregard the opinion expressed by the medical referee in his report that 'an operation would be of little benefit, and that the injury to the hand is permanent,' and to delete it from the report on the ground that he had gone beyond the terms of the remit to him.

"I issued an award on 17th February 1915, and held that I could not delete said expression of opinion from the report of the medical referee, but that neither could I take said opinion as a factor in the case, as it had gone beyond the terms of the remit, which was confined to a point which the other evidence had not made clear. I therefore found that 'the risk of taking an anæsthetic is not more than ordinary' in the case of the appellant, and in respect (1) that by the proposed operation the appellant's total incapacity might have been modified to partial incapacity, and (2) that she had refused to undergo such operation, I diminished the weekly compensation from 6s. to 5s., and found the appellant liable to the respondents in expenses, modified to the sum of £5, 5s."

The *questions of law* for the opinion of the Court were—"1. Was the remit to the medical referee competent in the circumstances? 2. Was I, in the circumstances, justified in reducing the compensation?"

The Case at the instance of the *Employers*, after the same narrative, *mutatis mutandis*, submitted these *questions of law*—"1. Is the respondent, by her refusal to undergo the said operation, precluded from insisting on payment of compensation? 2. In view of the facts found was I bound to end or suspend the respondent's compensation?"

Argued for the employee—(1) The arbiter had power to remit to a referee when there was evidence which was insufficient or conflicting on a point of importance in the case—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule II (15); Statutory Rules and Orders, June 27, 1907, Part V (20)—but not when there was no evidence—*Carroll* v. *Gray & Sons*, 1910 S.C. 700, 47 S.L.R. 646. Here there was no evidence on the question of risk in the use of anæsthetics. (2) When the Sheriff did remit, he was bound to consider the whole of the report. (3) The arbiter should not have diminished the compensation. The question for him to consider was whether incapacity was due to the original injury, or was due to a *nova causa interveniens*, the workman's unreasonable conduct in refusing to undergo an operation. He had considered not this question but the question whether the workman's conduct was unreasonable or not. The evidence given in the facts stated could only lead to the conclusion that incapacity was not caused by unreasonable conduct—*Sweeney* v, *Pumpherston Oil Company, Limited*, June 23, 1903, 5 F. 972, 40 S.L.R. 721; *Devlin* v. *Chapel Coal Company, Limited*, 1915 S.C. 71, *per* Lord Mackenzie at p. 78, Lord Skerrington at p. 79, 52 S.L.R. 83, at p. 87.

Argued for the employers—(1) Remit to a referee was competent. The evidence was conflicting on the question whether the operation was a reasonable one, and the effect of the use of anæsthetics was part of that question. (2) The referee's function was to answer the questions put to him, and the arbiter was right in disregarding his report so far as it went beyond the remit. (3) The question whether incapacity was due to the injury or to subsequent unreasonable conduct was one for the arbiter. He had considered it, and there was evidence on which he was entitled to hold that incapacity was due to unreasonable conduct—*Sweeney* v. *Pumpherston Oil Company, Limited* (*supra*), *per* Lord President at 5 F. 974, 40 S.L.R. 723; *Donnelly* v. *William Baird & Company, Limited*, 1908 S.C. 536, 45 S.L.R. 394. *Devlin* v. *Chapel Coal Company, Limited* (*cit.*), had no bearing on the present case.

LORD PRESIDENT—Counsel on both sides of the bar formulated, with admirable clearness, the question which we have to consider. It is whether the workwoman's present incapacity is due to the accident which befell her on the 15th April 1915, or is due to her unreasonable conduct in refusing to undergo a minor operation? To that question the learned arbitrator has, apparently, not addressed himself. But, in my opinion, it would be idle to remit to him to consider the question, because for the reasons which I am about to state, it appears to me that only one answer could be returned—that her present incapacity is not due to her unreasonable conduct in refusing to undergo the operation, but is due to the accident which befell her while in the employment of the Clyde Spinning Company?

The facts which the arbitrator found which are material to the issue before us are these—(First) that the operation was a minor one, but would probably result in restoring, in large measure, the appellant's full powers; (second) that there was nothing apparently in her own constitution to render that operation an undesirable or dangerous one; (third) that her own medical man advised her not to undergo the operation; and (fourth) that probably the operation would be successful.

Now suppose that the learned arbitrator had stopped there and regarded that evidence as sufficient to enable him to decide upon the question, then, in my opinion, if he had held that the proximate cause of the woman's incapacity was her unreasonable refusal to undergo an operation, he would have been deciding contrary to the facts which were before him. For my part I am prepared to hold that, save in very special circumstances, the proximate cause of incapacity never can be the unreasonable refusal of a workman to undergo an operation if his own medical adviser advises him against undergoing that operation. That I regard as the result of the decision in *Sweeney* v. *Pumpherston Oil Company, Limited*, 5 F. 972, 40 S.L.R. 721. There can

be no doubt that this case is *a fortiori* of the case of *Sweeney*, because there the arbitrator had come to the conclusion that the conduct of the workman was unreasonable, all the medical evidence being the one way. When the case was debated it was admitted by counsel at the bar that another medical gentleman, whose evidence was not before the arbitrator, had expressed the opinion that an operation ought not to be undergone. The Court came to the conclusion, postulating that the evidence before the arbitrator was complete, that he had reached a right decision. In the present instance the arbitrator came to the conclusion that there was one blank left in the evidence, which was—Was the woman's condition such that the use of anæsthetics was likely to prove dangerous? and he asked the medical referee to give him an answer to that question. The medical referee not only answered the question, but made an addendum which I consider is vital. After stating that "the risk of taking an anæsthetic is not more than ordinary," he added—"but I consider that an operation would be of little benefit, and that the injury to the hand is permanent."

The arbitrator thought himself entitled and bound to disregard these words because they were not an exact answer to his question. I am of opinion that the arbitrator was wrong in disregarding the opinion expressed by Dr Newman, and in so excluding any light upon the question before him. He did not decide the question before him at that stage, and he was entitled, and I think bound, to consider all the evidence, including the opinion which the medical referee expressed in regard to the condition of the hand, even although it was not a direct answer to the question which had been put to him.

Upon these facts the arbitrator came to the conclusion that the unreasonable refusal of the appellant to undergo the operation was the cause of total incapacity—and that would, of course, have led to suspension of compensation altogether—and he fined her a shilling a week because she refused to undergo an operation which might have modified her total incapacity to partial incapacity. I do not think that finding can be supported upon any ground whatever, and accordingly, inasmuch as, for the reasons I have given, I think it would be idle to remit the case back to the arbitrator, I think we ought to answer the first question put to us in the affirmative and the second question in the negative.

LORD MACKENZIE—I think this is entirely a special case and that the questions ought to be answered in the way your Lordship proposes. What we have to decide is whether there was evidence before the arbitrator upon which he was entitled to find that the conduct of this girl had been unreasonable.

Now in considering what that evidence was, I think it is impossible for us to shut our eyes to the whole of Dr Newman's report, and if the whole of Dr Newman's report is read, and if the fifth finding be taken as an item of evidence in the case, then I do not think there was evidence upon which the arbitrator was entitled to come to the conclusion which he did. Upon that special ground I base my opinion in the case.

As to what the effect may be in any future application of the advice of the workman's own doctor, if that advice is countered by the evidence which in the opinion of the arbitrator entirely outweighs the advice so given, I reserve my opinion.

LORD SKERRINGTON—I concur.

LORD JOHNSTON was absent.

The Court in the case stated for Gracie answered the first question of law in the affirmative and the second question in the negative, and in case stated for the Clyde Spinning Company, Limited, answered both questions in the negative.

Counsel for Gracie—Sandeman, K.C.—Christie. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Clyde Spinning Company, Limited—Horne, K.C.—D. Jamieson. Agents—Drummond & Reid, W.S.

Friday, May 7.

BILL CHAMBER.

[Lord Dundas, Ordinary on the Bills.

BUCKHAVEN, METHIL, AND INNERLEVEN TOWN COUNCIL, WEMYSS PARISH COUNCIL, AND WEMYSS AND DISTRICT WATER TRUSTEES *v.* ASSESSOR OF RAILWAYS AND CANALS.

Valuation — Docks — Railway — Entrance Channels, Sea Wall or Embankment, Piers and Jetties — Valuation of Lands (Scotland) Acts 1854 (17 *and* 18 *Vict. cap.* 91), *secs.* 21 *and* 22, *and* 1867 (30 *and* 31 *Vict. cap.* 80), *sec.* 4.

The Valuation of Lands (Scotland) Acts 1854, secs. 21 and 22, and 1867, sec. 4, provide that railway undertakings shall be valued by the Assessor of Railways and Canals, and direct that in the case of stations, docks, and other offices belonging to a railway company a sum equal to 5 per cent. on the cost of construction shall be taken as the annual value thereof, which is to be deducted from the total value of the whole undertaking before such value is divided among the various parishes through which the undertaking extends, and is to be added to the share of the total value falling to the particular parish in which the station, &c., is.

Held per Lord Dundas (Ordinary on the Bills) that the entrance channels to docks, a sea wall, a jetty, did not fall to be treated as incidental parts of the docks belonging to a railway undertaking, but parts of the undertaking.