to meet the annuity, and that there was enough out of the surplus revenue to meet the outgoings.

I cannot say that I put anything upon that fact. In the first place, so far as Lord Ardwall is concerned, he says that the moment you construe the clause in that way the trustees would have had a perfect right to keep back a certain sum before dividing residue. No doubt it is true that Lord Dundas says that he does not think that this could have been met out of residue, and the Lord Justice-Clerk concurred with Lord Dundas and intimated that Lord Salvesen also concurred. It is a little unsafe to take the opinion of a concurring judge as adopting in so many words each and every proposition which another judge has said where that proposition is not necessary for reaching the judgment. So far as I am concerned, I am bound to say I cannot agree with Lord Dundas. I agree with Lord Ardwall. It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. Whether trustees as a matter of fact should retain part of the residue in order to meet these burdens is a question for themselves and a question of circumstances. I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another. As a result I think Miss Smart's testamentary trustees are entitled to repayment of six-sevenths of the feu-duty and proprietor's taxes which she paid.

LORD JOHNSTON—I entirely agree.

LORD CULLEN—I agree.

LORD KINNEAR and LORD MACKENZIE were sitting in the Extra Division.

The Court answered branch (*a*) of question 1 in the affirmative.

Counsel for the First Party—Mercer. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Maclaren. Agent—John Forgan, S.S.C.

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## HOUSE OF LORDS.

*Monday, November* 13.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

### MORGAN *v.* WILLIAM DIXON, LIMITED.

(In the Court of Session, December 24, 1910, 48 S.L.R. 296, and 1911 S C. 403.)

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *First Sched.* (4)—*Medical Examination of Workman on Behalf of Employer—Workman's Demand for Presence of his Own Doctor.*

It is not a matter of law but is a question of fact for the decision of the arbiter whether the demand of a workman, who is to be medically examined on the employer's behalf, under section 4 of the First Schedule of the Workmen's Compensation Act 1906, that his own doctor shall also be present at the examination, is reasonable (*diss.* Lord Shaw).

This case is reported *ante ut supra.*

Morgan, the workman, appellant in the Court below, appealed to the House of Lords.

At the conclusion of the arguments—

LORD CHANCELLOR—The question which is raised in this case is stated by the arbiter in a way which may be a little embarrassing, but we must deal with the case as it is stated.

The fourth clause of the First Schedule of the Workmen's Compensation Act confers upon the employer a right to have a workman who has given notice of an accident examined medically, and there is a duty on the part of the workman to submit himself to examination; but the statute is silent and the rules are partially, and I may say mainly, silent as to the time, the place, and the conditions of this examination. Under these circumstances practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute.

Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case is a question of fact in that particular case. If I were an arbiter I should say as a question of fact that in most cases—perhaps in nearly every case—it is quite reasonable on the part of the workman to desire the presence of his own doctor. That may be sometimes unreasonable because of inconvenience or expense or for other reasons which can be established and which one cannot forecast. I should have been disposed to say if there were no special circumstances, if there were no proof of inconvenience or expense, why should not the doctor of the workman be present? I see no harm that he can do; and I can conceive that he might be very useful. But it is not the function of a court of law, or of this House as a court of law, to take upon itself the decision of questions of fact which by the statute are left to the arbitrator or to the Sheriff or County Court Judge as the case may be. It is a matter for the arbitrator to decide who has been entrusted with the duty by law, and not for me to decide, who have not been entrusted with the duty of finding facts.

Now that being so, what are the questions of law which we are asked to determine? The first is whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employer. This question was raised by the appellant's own argument; it was the only contention which they did put

forward before the arbitrator; it has been put as a question of law to your Lordships. In my opinion the proper answer is that we cannot say as matter of law that a workman is so entitled; there is no absolute right of the kind claimed. It is a question for the Sheriff or the arbitrator in each case to determine whether the condition imposed by the workman is a reasonable or an unreasonable condition.

The second question appears to me to amount to practically the same as the first and to be dependent upon the appellant's contention before the Sheriff. It really is the same question, and it also is a matter of fact which must be decided in each case, the principle of law being that both sides should act reasonably. In short, if these are treated as questions of law I cannot answer in the affirmative either the one or the other of them. I cannot answer the first in the affirmative, and the second question seems to me to be the same as the first. Accordingly I am of opinion that the appeal must be dismissed.

I desire to observe that the question raised and decided by the Sheriff was not whether the condition was reasonable (which I think was the right question), but whether there existed a right in law in the absence of special circumstances as was contended by the workman before the arbitrator.

LORD ATKINSON—I concur. I think the parties came here to establish an absolute legal right in every workman to require that the medical examination by his employer's medical man should take place in the presence of his own medical man. I concur with my noble and learned friend on the Woolsack that the law gives him no such abstract right, and that therefore, that being the point raised, the appeal should be dismissed.

In my view the question whether there is a refusal or not under the Act to submit to examination is a question of fact, and any reasonable requirement that may be put forward by the workman, such as, for instance, having his own medical man present, ought not and would not by any reasonable arbitrator be held to amount to a refusal to submit to examination.

I further think that it cannot be held that the request to have the workman's medical man present upon all occasions can be considered as *prima facie* reasonable. On the contrary, I think, having regard to the wording of the statute, the burden of proving that the request is reasonable is thrown not upon the employer but upon the workman who makes it. I concur with my noble and learned friend in thinking that in many cases—indeed it would appear to me in most cases—in the absence of any inconvenience or difficulty in getting the attendance of the person required, it is a most reasonable thing that the medical attendant of the workman should be present at the examination.

I concur that the appeal having been brought forward to establish this abstract legal right it should be dismissed.

LORD GORELL—I concur in the result of the judgments which have been pronounced. I think that the question that was really contested in this case is made plain by reading one paragraph from the stated case, and that is this—"Parties were heard upon this minute, and it was conceded in argument by the appellant that there were no special circumstances in his case which called for the presence of his medical attendant at the examination, his contention" (and this is the real point of the matter) "being that it is the right of the workman in every case, without alleging any special reason, to have his medical attendant present at the examination, and to refuse to submit himself for examination unless and until his employers consented thereto."

I think that that paragraph states what was the real contest between the parties, which is expressed in a somewhat different way when you come to the statement of what is the question at the end of the case, the question being stated as a question of law for the opinion of the Court. I think that what was really raised by that statement and contention was the right of the workman, independently entirely of the question whether it was reasonable or unreasonable (which it may have been), to have his medical man present at every examination in every case as it is here stated. That is a proposition which cannot, in my opinion, be maintained as matter of law, and I concur with what has fallen from the noble and learned Lords who preceded me. It leaves out of consideration altogether what in these cases is practically a question of fact—whether it is reasonable or not for the workman to have his medical attendant present at the examination made on behalf of the employer. This contention is stated as amounting to a right wholly independent of whether there is any reason or not for another doctor being present—that is to say, that the workman shall have the right to have his own doctor present. I agree with what has fallen from my noble and learned friend Lord Atkinson. I think the burden is on the workman to show that there is some reason for the attendance of a further medical man, because, as I ventured to suggest in the course of the argument, *prima facie* under the statute the employer has the right to have the examination in order to see what his position is. The workman, on the other hand, has to submit to it, and if he raises any objection by reason of his desire to have another medical man present, he raises a condition on his part, and I think it is for him to give the reason for raising such a condition.

For these reasons I concur in the view that this appeal should be dismissed.

LORD SHAW—Differing as I do so radically from your Lordships, I should naturally have desired time for further consideration as to the form of my judgment.

But in the circumstances my mind is so clear as to my own course that I cannot have any hesitation in dissenting, although I do so with diffidence. I am glad to be

supported in the view which I entertain by the unanimous decision of the Court of Appeal, consisting of the Master of the Rolls and Lords Justices Farwell and Kennedy, in the case of *Devitt*, 1909, 2 K.B. 802. Your Lordships have not referred to that decision, but in the Court below the learned Lord Justice-Clerk referred to it thus—"There may have been many circumstances in that case as to which no inquiry or investigation was made, but which might have made the suggestion of the workman a perfectly reasonable and proper suggestion. It might have been most dangerous to the man himself to proceed without the practitioner being present who knew him and knew the state of his constitution, and who if anything was being done in the course of the examination could suggest that something ought to be done or something ought not to be done as the case might be. That is not the kind of case we have here." We were assured by the learned Lord Advocate, who had perused the papers in the case, and it was not denied, that there were no such special circumstances in *Devitt's* case, and that the case as presented stood entirely as the present case stands; and there can be little doubt accordingly that the helpfulness and value of the case of *Devitt* was to some extent mitigated by this misapprehension. In my opinion the case of *Devitt* was rightly decided, and I desire to express my concurrence with the judgment therein of the learned Master of the Rolls.

I have not heard from anyone of your Lordships anything in the nature of an abstract consideration which would make the proponing of this condition unreasonable upon the part of the workman. When section (4) of Schedule I of the Act of 1906 was enacted it provided that "where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner, provided and paid by the employer, and if he refuses to submit himself to such examination or in any way obstructs it his right to compensation shall be suspended." What has happened in this case is that the workman being so requested by the employer to submit to an examination has consented to that examination subject to his own medical man being present. Anything less reasonable, to my mind, than the proposition that that is an out-and-out refusal does not occur to me at present, nor does it occur to me how that can be characterised as an obstruction. I do not find it in any way inconsistent with the statute that unless a refusal or obstruction shall be established the workman's reasonable rights should be respected equally with those of the employer.

In this case it is said that the adjecting of this condition amounted to a refusal unless the workman was able to allege a reason in advance for having his desire gratified that his own doctor should be with him whilst his master's doctor was examining him. In the course of the argument I put the ordinary case, How can an injured workman allege such a reason in advance? He may have sustained injuries—in many cases he does sustain injuries—which produce not only direct but indirect effects. It is of the utmost advantage to both parties that medical men representing adverse sides in what might turn out to be a contention should at the same place, at the same time, and under the same circumstances be parties to the one examination. It is, however, now I presume declared by law that unless it is so found in advance as matter of fact that that is a reasonable thing, this House is to be debarred from saying that in point of law that is the workman's right.

I put the proposition in point of law thus—that the right of the employer on the one hand to compel the submission of a workman to a medical examination has its correlative in the right of the workman to be protected and to have his interests seen to while that examination is being conducted. I agree with my noble and learned friend on the Woolsack that there is a right on the one hand and an obligation on the other, and *e converso*, and I further agree that it is the duty of both parties to have these rights and obligations reasonably respected and performed. But in these circumstances what has been asked by the workman here? He has been asked to submit to an examination, and on the contrary side he says, "I shall do so, but observe, please, my right, which is that my doctor shall be there."

I submit the view to your Lordships, which I regret has not been accepted, that in so proponing the workman's right the workman has done that which put the legal situation thus—that it was for the employer denying the right upon the side of the workman to establish that his denial was a reasonable one.

As I construe the case, and speaking for myself, it is not the fact that an abstract right of an absolute universal character is sought to be established. What is sought to be established here is laid down in the proposition by the learned Sheriff. It is to this effect—"whether apart from any special circumstances in a particular case a workman is entitled to have his own doctor present." I have no hesitation for my own part in saying that that proposition ought to be answered in the affirmative. I think it is the right of a workman who has to submit his person for examination to have his doctor present, apart from any special circumstances in a particular case which would negate and nullify such a right. In those circumstances I should have no hesitation in deciding the case in a contrary sense to that which has been proposed from the Woolsack.

Now what are the facts of this case? There are none; there are no special facts found by the learned Sheriff here at all. He has decided solely in the abstract that special circumstances being absent this right does not exist, or rather, he has decided that apart from special circumstances the workman has no such right.

As I say, there is no fact here to specialise

this case at all and make the workman stand deprived of the right correlative to the examination to which I have referred. I bear in mind further that in the ordinary case, which is the case we are dealing with here, a case admitted to be apart from speciality, I cannot conceive any harm done either to the workman or to the medical adviser of the employer by having a second doctor on the spot. There is to be no charge to the employer, for it is to be done at the workman's own cost, and for my own part my recollection, I think, bears me out in saying that my experience of that great profession would be that 95 per cent. of doctors would prefer another doctor being present so far as their own satisfaction and the ease of the situation and the settlement of the truth were concerned.

But in the present case there is a special use attached to the presence of the other medical men. Section A of the schedule is not a section applicable to proceedings *in foro*. It is a section applicable to this situation where only notice of accident has been given, and where it must be the desire of both parties that an amicable and reasonable arrangement shall be come to. How desirable it is in those circumstances that this situation should be eased in the particular matter that both doctors shall agree as to what is wrong and what would be a suitable remedy. All the demand that the workman has made here is that that agreement should be facilitated by the presence of his medical man. I cannot think that in its nature to be unreasonable. There are no facts in this case proved or proceeded upon to make it unreasonable or to suggest that it was unreasonable; and unless it is found in fact to be unreasonable owing to special circumstances I do not think this House should be debarred from holding that the workman had that right apart from such circumstances.

As I have observed, I do not think the decision come to in the Courts below was a decision in fact. I do not think the Sheriff had addressed himself to it as a decision in fact. He has treated the case as one of absolute right (conditioned in the sense I have explained)—a right which he concludes not from fact but from a construction of the Act of Parliament. In my view that is a matter of law. My whole view may be summed up in this proposition, that in the general case in my humble opinion it cannot be reckoned as a refusal if a workman makes an examination by his own medical man a condition of his willingness to submit to examination by the medical adviser of his employer. I cannot agree that in the Courts which have decided this case the fact *ipso jure* of the adjection of such a condition is a refusal or obstruction. I hold it is nothing else than a reasonable thing, not displaced from its reasonableness by any fact proved. Accordingly I respectfully dissent from the judgment proposed.

LORD CHANCELLOR—I just wish to add one sentence. According to my own opinion it is a question of fact whether or not the presence or absence of the workman's doctor is reasonable in the particular case, and your Lordships are not judges of fact. That is all I intended to convey.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellant—The Lord Advocate (Ure, K.C.)—Fenton. Agents—Hay, Cassels, & Frame, Hamilton—Simpson & Marwick, W.S., Edinburgh—Deacon & Company, London.

Counsel for the Respondents—D.-F. Scott Dickson, K.C.—Beveridge. Agents—W. T. Craig, Glasgow—W. & J. Burness, W.S., Edinburgh—Beveridge, Greig, & Company, London.

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*Monday, November* 13.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

ROSIE *v.* MACKAY.

(In the Court of Session, June 14, 1910, 47 S.L.R. 654, and 1910 S.C. 714.)

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *sec.* 16 (1), *and Sched. II* (17) (*b*)—*Appeal—Statute—Jurisdiction.*

The Workmen's Compensation Act 1906, sec. 16 (1), enacts—"This Act shall come into operation on the first day of July 1907, but, except so far as it relates to references to medical referees and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act." Schedule II (17) (*b*) gives an appeal to the House of Lords from a decision of the Court of Session.

In an arbitration under the Workmen's Compensation Act 1897, arising out of an accident which occurred on 20th November 1906, the arbiter, with consent, remitted to a medical referee, and on his report, without further evidence, gave his decision reducing the compensation previously paid by a half. The employer appealed by stated case to the Court of Session, whose decision was that compensation should be ended.

*Held* that the House of Lords had no jurisdiction to entertain an appeal, as the words in the Workmen's Compensation Act 1906, sec. 16 (1), "proceedings consequential" on references to medical referees, would not cover the case.

The case is reported *ante ut supra.*

Mackay, the workman, appealed to the House of Lords.

LORD CHANCELLOR—We were promised an interesting discussion upon a point of law under the Act of 1897 which I am afraid we shall be debarred from the pleasure of