and I agree with the argument—so concise and clear—of Mr Mackay that the further correspondence shows that at the moment when an attempt was made by these London merchants to make it apply to the existing contract, with which this House is now concerned, that attempt was at once blocked by an immediate contradiction.

But I go thus further. Supposing the circular letter had referred to the existing contract, in my opinion that circular was a proper circular to issue, and I do not think that a circular so issued can be viewed in the light of a demand by the sellers for the adjection of a new term to the bargain. That adjection is not demanded by one party to the contract; the adjection was made by the law itself. It does not affect the contracts, their existence, or their continuance; it affects merely the rights of the persons coming into possession of the goods under any current contract. That and that alone was the meaning of the circular letter. If the contract had stood the circular letter would, in my opinion, have been equally justified; as it was it so turns out that it did not apply to these particular contracts with which the House has had to deal.

Their Lordships ordered that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Court of Session.

Counsel for the Appellants — Mackay, K.C.—Gentles. Agents—Hill & M'Gregor, Dundee — Douglas & Miller, W.S., Edinburgh—James, Mellor, & Coleman, London.

Counsel for the Respondents—Sandeman, K.C.—D. Oswald Dykes. Agents—Guild & Shepherd, W.S., Edinburgh—Waltons & Company, London.

Friday, December 3.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CANT *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation—Whether Incapacity Results from Injury — Refusal to Undergo Surgical Operation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule,* (1) (*b*).

The employers of a workman who had sustained an injury to the thumb of his right hand, and who was in receipt of compensation, sought to have the compensation ended on the ground that the workman's incapacity was due, not to the injury which he had sustained, but to his unreasonable refusal to submit to surgical treatment. The medical evidence led by the employers was to the effect that if the workman underwent certain operations which were recommended by their doctors, the first of which involved the amputation of the top of the thumb, and the second (which was recommended by a specialist) was an operation of a different kind, the condition of his hand would be materially improved. The workman's medical adviser, whom he had consulted in reference to both proposals, was clearly of opinion that neither of the operations proposed would have the effect predicted. *Held* (*affirming* the judgment of the First Division) that in the circumstances stated there was evidence which justified the finding of the arbiter that the employers had failed to prove that the workman's incapacity was due to unreasonable refusal to undergo surgical treatment.

In an arbitration under the Workmen's Compensation Act 1906 Alexander Cant, miner, Cowdenbeath, *claimant and respondent,* craved warrant to record a memorandum of an agreement between him and the Fife Coal Company, Limited, *respondents and appellants,* dated 21st April 1919. The company craved a review of compensation, and asked the arbiter to grant an award finding that the claimant's right to compensation came to an end at 31st May 1919, or in any event came to an end for the time being on said 31st May 1919, or at such other date as the Court might determine, on the ground that his incapacity from the accident after mentioned had come to an end, and that his incapacity was due to his unreasonable refusal to undergo a minor operation.

The *facts* admitted or proved were as follows:—1. The respondent was on 23rd October 1918 a miner in the employment of the appellants at their No. 10 Pit, Cowdenbeath. On said date he sustained personal injury by accident arising out of and in the course of his employment through a stone falling from the roof and crushing the thumb of his right hand. The thumb was severely lacerated, and the bones at the metacarpal joint were fractured. 2. The respondent was totally incapacitated, and received compensation from the appellants in respect of total incapacity. On 11th March 1919 he started light work, and on 21st April 1919 the agreement, of which a memorandum was lodged for registration, was entered into. By that agreement the appellants undertook to pay compensation to the respondent in respect of partial incapacity at the rate of 8s. per week. Compensation at said rate was paid to 31st May 1919, after which date the appellants discontinued payment. 3. At the time when said agreement for payment in respect of partial incapacity was entered into, the wound on the respondent's thumb had healed, but the thumb was in a fixed position, laid on the palm of the hand with the distal phalanx flexed at a right angle. That is still the condition of the respondent's thumb. The effect of this fixed position is that the respondent is unable to grasp with his right hand. He cannot move his thumb, and the position of the distal phalanx interferes with the grasping power of the fingers. 4. The metacarpal joint of the respondent's right thumb is ankylosed, *i.e.*, it is fixed by bony structure, which makes it rigid and incapable of movement. There is no structural defect in the carpo-metacarpal joint or in the inter-phalangeal joint. They are both capable of some degree of passive movement. The fixed position of the carpometacarpal joint is due partly to non-use, and partly to contraction of the scar in the web of the thumb. The fixed position of the interphalangeal joint is due partly to non-use and partly to injury to the extensor tendon by which it is controlled. The nonuse is caused by the thumb having been kept in a rigid position during the process of healing, after which the respondent was unable to move it, and this condition was probably assisted by destruction and sloughing of muscle at the time of and shortly after the injury. 5. The respondent was medically examined on behalf of the appellants on 3rd May 1919. On 16th May the appellants' law agent, by letter addressed to respondent's law agent, proposed that the respondent should submit to an operation by which the distal phalanx of the injured thumb should be amputated and a little plastic operation be performed to relieve the scar in the web of the thumb. On 21st May the respondent's agent replied that the respondent was advised by his doctor that the operation would be useless, and he was therefore unable to agree to the proposal. 6. On 8th July 1919 the respondent was examined by a surgical specialist on behalf of the appellants. On 15th July the appellants' agent proposed that the respondent should submit to operation. The suggestion was made in the following terms:—'Your client, as arranged, duly attended on Mr Wade for examination, and I have now that gentleman's report. He agrees with the other doctors that in this case operative interference is indicated, but although he admits that the method employed would probably vary according to the surgeon, he personally differs rather as to the nature of the operation to be performed. He states that personally what he would be inclined to do would be to straighten the finger under an anæsthetic and maintain it in that position for a suitable period. The second stage of the treatment would be to free the scar binding down the extensor tendon on the back of the thumb and repair it. The ankylosed joint he would not interfere with. The final and most important stage of the treatment would be the exercise of the hand by Cant himself, which Mr Wade considers if persevered in would give a most useful hand and a very satisfactory result. Personally he would not be inclined to amputate the thumb in whole or in part. As you will see, this treatment differs somewhat from that suggested by our own medical officer and communicated to you in my letter on 16th May last, but this is just the difference that Mr Wade admits would arise among different surgeons. As, however, the treatment now suggested does not embrace the removal of any part of the hand, and is, moreover, suggested by a surgeon of eminence, I think it right to inform you of what Mr Wade suggests, and to allow me to do this the case was to-day continued for a fortnight.' I shall be glad to hear from you at your earliest convenience whether your client is prepared to undergo the treatment now indicated. On 1st September the respondent's agent replied that his client was prepared to undergo the operation if the appellants' doctor could assure him that he was confident that the operation would be successful, and that the complete use of his thumb would be restored, but if such an undertaking could not be given the respondent was not prepared to undergo any operation which was largely experimental in character. The appellants' agent replied—'I do not think that there is anything I can really add to my letter of 15th July. The metacarpal phalangeal joint of your client's hand is ankylosed, and as the surgeon did not propose to interfere with it, it is obvious that the treatment suggested would not restore the complete use of the thumb, but the surgeon is satisfied that it should give the lad a very useful hand. He admits, however, that the result will depend to a large extent upon the lad having confidence in the surgeon who treats the hand and in exercising the hand under the surgeon's directions even at the expense of some discomfort. Accordingly, as you will see, it is impossible to guarantee the result of the treatment.' The respondent's agents wrote in answer—'We have now heard definitely from our client that he is unable to agree to the suggested operation. We have therefore asked our correspondents to fix a diet of proof when the case calls in Court.' 7. Both the operations suggested by the appellants are minor operations; they involve no serious risk to health or excessive suffering; they are of such a nature that a reasonable man who wished to recover the use of his hand and appreciated their nature and purpose would submit to one or other of them. But the success of either operation would not be entirely dependent on surgical skill. Neither operation would completely restore the use of the respondent's hand, because (*a*) it was not proposed to interfere with the metacarpal joint, and (*b*) in the case of the first operation it was proposed to amputate the distal phalanx, and in the second the degree of movement which it is possible to restore to the inter-phalangeal joint depends on the amount of injury sustained by the extensor tendon, which is unknown. Further, the degree of success would largely depend on the patient's confidence in the surgeon, and his willingness to carry out the surgeon's instructions after the operation by exercising the freed joints even at the expense of personal discomfort. The respondent is twenty-four years of age, and apart from his thumb, he is in perfect health and bodily vigour. Given all favourable conditions, either suggested operation would restore a large measure of usefulness to the respondent's hand. 8. The respondent was ignorant of the nature of either operation or of its probable result. On each occasion he consulted the medical practitioner who had attended him after his injury. This doctor had been treating his thumb with an electrical vibrator in the hope of restoring movement to the inter-phalangeal joint. His treatment was unsuccessful. The advice the respondent received was that he should refuse to undergo either operation, on the ground that both were merely experiments, that the operation first suggested might help the respondent, but his adviser did not think it would, and that the operation afterwards suggested would not make his hand more useful than it is at present. The respondent, in refusing to undergo either operation, was guided by the advice of his doctor. The advice given to the respondent was advice which might not unreasonably be given by a general practitioner. It was based, *inter alia*, on the destruction of muscle he had observed at and shortly after the time of the accident, and on the failure of the treatment which he had applied."

On 17th November 1919 the Sheriff-Substitute (UMPHERSTON) granted warrant to record the memorandum of agreement, and refused the appellants' crave to end the respondent's right to compensation, holding that the appellants had failed to prove that the respondent's continued incapacity was due, not to the injury sustained by him on 23rd October 1918, but to unreasonable refusal to undergo surgical operation.

In a *note* the arbiter, *inter alia*, stated—"The wound which the claimant's thumb sustained healed in a few weeks. But the metacarpal joint is ankylosed, and the thumb is in a fixed position, laid on the palm of the hand with the inter-phalangeal joint flexed at a right angle. The result is that he is unable to grasp things with his hand because he cannot use his thumb, and the position of the distal phalanx of the thumb interferes with grasping on the part of the fingers. Otherwise the claimant is in perfect health, and he is a young man of twenty-four years of age.

"The thumb is moved by the use of three joints, being in their order from the wrist the carpo-metacarpal, the metacarpal, and the inter-phalangeal. The second of these being ankylosed is altogether incapable of movement in the claimant's case. The other two are capable of a small degree of passive movement. There is no structural injury to these joints. In May and July the respondents made two suggestions for surgical treatment in order that he might recover the use of his hand. When they were communicated to the claimant he very naturally consulted his own doctor, who told him that both would be useless, and the claimant refused to undergo either operation.

"The object of the operation which was first suggested was to restore the full movement of the carpo-metacarpal joint; the inconvenience of the distal phalanx of the thumb in its rigid position was to be removed by amputation of the phalanx. Under the operation which was afterwards suggested full movement was to be restored to the carpo-metacarpal joint and a degree of movement was to be given to the inter-phalangeal joint, no amputation of the phalanx taking place. In other words, the purpose of the first suggested operation was to give the claimant one moveable joint in his thumb, the purpose of the other was to give two moveable joints.

"As to the nature of the operations the respondents' three medical witnesses—the claimant's medical adviser was not questioned on the subject—were unanimous to the effect that both were minor operations involving no serious risk to health or unnecessary suffering, and that any reasonable man would submit to one or other of the operations for his own sake apart from any question of compensation. But their view was conditioned in this way, that success was not altogether a question of surgical skill. The surgeon's duty could be performed with success, but the recovery of the desired movement in the joints would depend on the co-operation of the patient by carrying out the instructions of the surgeon afterwards in exercising the hand even at the expense of suffering some personal discomfort, which I understand to mean some pain. The claimant's medical attendant adhered to his view that both operations were experiments; that the operation first suggested might help the claimant, but that he did not think it would, and that the second would not make his hand more useful than it is at present. What he meant by experiments he did not further explain. He thought that nothing could be done which would be of service unless movement could be given to the metacarpal joint. I am quite satisfied that in regard at least to the second proposed operation the claimant's doctor had not appreciated what had been suggested when he gave his advice to the claimant, and I am doubtful if he understood the proposal even when he left the witness-box.

"The question which I have to determine, however, is whether the claimant's incapacity is due to his unreasonable refusal of treatment. In the witness-box he said—'I am willing to undergo any treatment that will give me the use of my thumb. I had the suggestion made to me of the first operation. . . . I had no views as to whether I should go or not, but I went to the doctor. On the advice of my own doctor I decided not to undergo the operation.' And as to the second suggestion—'I also consulted my doctor, and he said the operation was purely experimental. On his advice I also refused to undergo that operation. He told me that my hand was in a permanently fixed condition, and that any operation would not be of much use, and that it would only be experimental.' It is unfortunate that the claimant did not have the advice of a surgical specialist selected to advise him apart from the respondents'. But failing this advantage it seems to me that his attitude and conduct were eminently reasonable.

"Having no knowledge of medical science he asked advice in the only quarter he considered available to him. If the advice he received was hasty and ill-considered, or suffered from lack of knowledge of modern surgical methods (excusable in a busy country practitioner), that could impute no blame to the claimant. And I cannot say that it was unreasonable on his part to follow the advice so received."

The Company appealed to the First Division of the Court of Session on the following *question of law*:—Was there evidence on which the arbiter was entitled (*a*) to find that the appellants had failed to prove that the respondent's incapacity was due to unreasonable refusal to undergo one or other of the proposed surgical operations and subsequent treatment, and (*b*) to grant warrant to record the memorandum of agreement?

The appeal was heard by the LORD PRESIDENT (STRATHCLYDE), LORD SKERRINGTON, and LORD CULLEN, and on 9th March 1920 their Lordships answered the question of law in the affirmative in both its branches and dismissed the appeal.

Their Lordships' opinions as printed in the appeal to the House of Lords were as follows:—

LORD PRESIDENT (STRATHCLYDE)—After the full citation of authority which we have had in this case I adhere to the opinion which I expressed in the case of *Gracie* v. *Clyde Spinning Company*, 1915 S.C. 906—'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.'

In the case before us I find no very special circumstances. The case is a very simple one. By an accident arising out of and in the course of the employment the respondent had his right hand seriously injured. Certain medical gentlemen of experience and skill said that if the respondent were ready to undergo an operation, which was a minor operation and involved no risk to the respondent's health—such an operation as a reasonable man would undergo for his own interest—it might reasonably be expected to relieve or diminish his incapacity by restoring his hand, if not completely, at least to a degree of usefulness.

That was very reasonable advice, but we find that the respondent's own doctor advised him that he should not undergo either of the operations, that these were mere experiments, and might be useless and leave him where he was. The arbitrator found that that was advice that might not unreasonably be given by a general practitioner.

In these circumstances I cannot say that the arbitrator was wrong when he held that the employers had failed to prove that the man's incapacity was due to his unreasonable refusal to undergo that operation. There were facts before him to justify that finding, and even if I had differed from him I would have been slow to disturb the arbitrator on a matter so entirely within his province. I am far from saying that I should not agree with the arbitrator in the conclusion which he reached. It seems to me that it would be a very strong thing to say that a workman was unreasonable in preferring to follow the opinion of his own medical attendant advising him, acting not unreasonably, not to undergo the operation.

I am therefore for answering the question put to us in the affirmative.

LORD SKERRINGTON—It would obviously be wrong to attempt to lay down any general rule as to whether it was always reasonable or always unreasonable for a workman to follow the advice of his own medical attendant rather than the advice of other medical or surgical experts which had been taken and communicated to him by his employer. As I read the case of *O'Neill* v. *Brown & Company*, decided by the Second Division, and reported in 1913 S.C. 653, all that was laid down in that case which could be of general use and application was this, that it was fallacious to suppose that a workman necessarily acts reasonably if he follows the advice of his own medical man.

I think it is quite easy to figure cases to one's self where the workman would act unreasonably if he insisted on following the advice of his own medical man. The circumstances might be such that it would be only reasonable for the workman to consult an expert on the question whether—there being a serious difference of view, and there being everything to gain and probably nothing to lose by submitting to the experiment—he ought not to comply with the suggestion of the medical advisers of the employer. Or again, if the whole subject in its medical aspects had been thoroughly thrashed out at the proof, and a flood of light had been thrown upon the whole question which was necessarily awanting at an earlier stage, it might quite well be that the workman would act unreasonably if he refused to submit to an operation of a minor character where there was everything to gain and nothing to lose by making the experiment. As I understand the arbitrator's note, he rather indicates that if this workman should hereafter obstinately persist in refusing to undergo an operation the case might acquire an entirely different aspect.

But regarding the matter from a *prima facie* point of view, I entirely agree with the opinion of your Lordship in the chair in the case of *Gracie*. I think *prima facie*, that it is impossible to say that a workman is unreasonable merely because he follows the only advice which is available to him at the time—that of his own medical attendant. That seems to me the natural and *prima facie* aspect of the matter, and, looking at the whole material facts disclosed to us in this Stated Case, I have no doubt whatever that the learned arbitrator was right in holding that the employers had failed in convicting this man of unreasonableness, and in showing that the chain of causation had been broken as between the accident on the one hand and the incapacity of the workman on the other, and that the incapacity was really due to a new cause, namely, his own unreasonable conduct.

I may say that the peculiarity of the present case is that the claim of the employer, so far as I can ascertain from the Stated Case, is not that the workman's right to compensation should be suspended either from some particular date or from the date of the proof, and that the compensation should be reduced in the meantime to a penny per week, but the claim, as I read the Stated Case, is that we should hold that at some period or at some date antecedent to the proof—the employer suggested the month of September 1919—enough information as to a different medical opinion had found its way to the mind of this man so as to make him unreasonable in not acting upon it.

When I look at the facts I am disposed to think that the second letter from the employers' solicitor, which came to this man in the month of September, singularly confirmed the good sense of the workman and of his own medical man in refusing to sanction the amputation of the top of his thumb, because the second medical opinion communicated to this man was that he should undergo an operation of an entirely different character.

These being the whole material facts of the case, I think it is impossible to say that if the thing had happened to ourselves we should not have been very apt to be confirmed in the opinion of our own medical adviser rather than to consider that it was an unreasonable or mistaken opinion which we ought not to follow.

LORD CULLEN—I am of the same opinion.

The Company appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This is an appeal against an interlocutor of the Judges of the First Division of the Court of Session in scotland pronounced in a Stated Case dated the 19th January 1920, under the Workmen's Compensation Act 1906, from the sheriffdom of Fife and Kinross at Dunfermline. The arbitration was held in the following circumstances:—The respondent on the 23rd October 1918 sustained personal injury while in the employment of the appellants, and the injury was sustained by accident arising out of and in the course of his employment through a stone falling from the roof and crushing the thumb of his right hand. In the result the thumb was severely lacerated, and the bones at the metacarpal joint were fractured. The respondent was totally incapacitated, and received compensation upon that basis. On the 11th March 1819 he started light work, and an agreement was entered into by which the appellants undertook to pay him compensation in respect of partial incapacity at the rate of 8s. a-week, and compensation at that rate was paid until the 31st May, at which date it was discontinued.

The appellants at this period took up the position that if the applicant would submit his hand to an operation the incapacity would cease wholly or in part, and the case put forward on their behalf was that if he refused to submit to this operation this incapacity, or part of this incapacity, would no longer be due to the accident but to his unreasonable refusal.

The matter was dealt with by the arbitrator, and findings of fact were reached by him. He had before him the medical adviser of the applicant; he had also before him three medical witnesses who were called on behalf of the appellants. The evidence of the medical witnesses for the appellants was to the effect that two different operations had been suggested; the first of these operations would involve the amputation of the distal phalanx of the thumb; the second of these operations, which was recommended by a specialist, was an operation of a different kind; but all the doctors who were so called on behalf of the appellants were of opinion that if one or other of these operations were adopted the condition of the applicant's hand would be materially improved.

Now he consulted, as was natural, his own medical adviser in reference to both of these proposals. His medical adviser had the advantage of contemporary knowledge of the condition of the muscles of the finger and hand generally, and he was clearly of opinion that neither of the operations proposed would have the effect which was hoped and predicted by the doctors who advised them.

Under these circumstances the arbitrator reached his conclusion, and as I read the effect of his judgment it is this - "In my view the advice tendered by the appellants' doctors was reasonable advice. I think a reasonable man might, and very likely would, have accepted that advice and submitted himself to one or other of the operations successively recommended." That is the effect of the passages to which our attention was directed by Mr Sandeman. But when the learned arbitrator reached that part of his opinion in which he summarises his view this is what he says—"I refused the appellants' crave to end the respondent's right to compensation, holding that the appellants had failed to prove that the respondent's incapacity was due to unreasonable refusal to undergo surgical operation."

I myself read that as a clear finding of fact on the part of the arbitrator to the effect that the appellants (upon whom the *onus* lies) had not proved that the respondent's incapacity was due to unreasonable refusal, and the only question I have to ask myself is, Was there evidence before the arbitrator in reliance upon which he was justified in reaching this conclusion? I have no doubt at all that there was such evidence. If I am told that there is an inconsistency between the conclusion to which I have just directed attention and the earlier passage in the learned arbitrator's opinion, I cannot agree with that view. I can conceive easily of circumstances in which one set of doctors, whose duty of course it was to advise the employers, recommended one course, and in which the patient's own medical adviser (approaching the inquiry from a different angle) recommended another course, in which the balance of discussion would be so nicely preserved that even in the mind of a very sagacious man it would be doubtful as to which side a prudent decision would lie. In such a case it would be very strange indeed in a debate so nicely balanced if the arbitrator might not reach the conclusion that a man who had accepted the advice of a specialist was a reasonable man, and equally that a man who accepted the advice of his own doctor was a reasonable man. It is indeed a matter of common experience that upon very controversial questions reasonable and even very sagacious men are in the habit of reaching different conclusions. It would be impossible to hold that here there was not evidence before the arbitrator which most fully warranted the conclusion which he reached.

This is not, of course, to lay down as a general rule that in every case, whatever the circumstances may be, an applicant is excused from the obligation to adopt a reasonable course because he has received advice to the contrary from his own medical adviser. One must in each of these cases consider the circumstances. One can very easily imagine a case in which the overwhelming balance of medical opinion recommended an operation, and an unreasonable and indefensible attitude on the part of the man's own medical adviser was relied upon. No dictum could be, or ought to be, laid down which would encourage the view that in such cases, in reliance upon the unreasonable advice of the man's own medical adviser, he could excuse himself from submitting to an operation. But the only conclusion I can reach upon this case is that the arbitrator was justified, having regard to the evidence before him, in reaching the conclusion that the respondent's incapacity was not "due to unreasonable refusal to undergo" either of the operations suggested. And it is worth while in this connection to call attention to the circumstance that the first operation differed in a very important respect from the second, and that if he had accepted the advice of the appellants' doctor and submitted to the first operation he would have sustained an amputation which (as the second and more weighty recommendation showed) was neither necessary nor desirable.

For these reasons I think this appeal must be dismissed, and I move your Lordships accordingly.

VISCOUNT FINLAY—I am of the same opinion. The law is quite clear with respect to this matter. If unreasonable conduct on the part of a workman is the real cause of injury which supervenes, then he cannot recover for it. He is himself to blame for unreasonable conduct in refusing treatment which would have prevented the evil happening which has in fact befallen him.

The question here being whether such unreasonable conduct had been brought home to the claimant as to cause what he was suffering the Sheriff found that it had not, and the only question raised by the case on which we can possibly enter is as set out at the end of the case stated by the arbiter—"The question of law for the opinion of the Court is, Was there evidence on which I was entitled to find that the appellants had failed to prove that the respondent's incapacity was due to unreasonable refusal to undergo one or other of the proposed surgical operations and subsequent treatment?" The arbiter found that the appellants had failed to establish that proposition, and most certainly there was evidence upon which the arbiter might base that finding. It has hardly been argued that there was not such evidence, and I do not see how it is possible to answer the question otherwise than it was answered in the Court of Session.

LORD DUNEDIN—I concur in all that has been said by my noble and learned friend on the Woolsack, and I am glad to find that in so far as he dealt, not with the question of evidence, which after all is the only question in the case, but with the general remarks, he has really confirmed in terms what was said by Lord Dundas in the case of *O'Neill* v. *Brown & Company, Limited*. I also think that the matter is most satisfactorily dealt with in the judgment in this case by Lord Skerrington.

LORD ATKINSON—I concur with all that has been said by my noble and learned friend on the Woolsack and my noble and learned friends who have preceded me.

The arbitrator finds "that the appellants had failed to prove that the respondent's continued incapacity was due, not to the injury sustained by him on 23rd October 1918, but to unreasonable refusal to undergo surgical operation." He asks the question of law—Was there evidence before him upon which he might legitimately come to that finding? It appears to me that there was ample evidence? The most guiding fact in the case is that this man's own doctor—a practitioner, not an eccentric at all who might have peculiar views, but a general practitioner—advised him not to undergo the operation. It has been found that that was reasonable advice for a general practitioner to give, and how a man believing in the doctor he consults, though he may be a general practitioner, can be said to be guilty of unreasonable conduct passes my comprehension altogether.

I entirely concur with what my noble and learned friend on the Woolsack has said, that there is no abstract rule that can be laid down with regard to what refusal may be in any particular case, but one must look at all the facts of the case to explain whether the conduct was unreasonable in each particular case owing to the surrounding circumstances.

LORD SHAW—I agree with all of your Lordships, but I also desire to say that I expressly agree with the judgment of Lord Skerrington in the Court below.

There are only two observations which I desire to add. The first is, that in looking through this admirable statement which has been made by the learned Sheriff-Substitute, I think he has precisely stated the form in which the question in these cases arises in law. The *onus probandi* is properly reckoned by him to rest upon the appellants—that is to say, upon the employer

—and the issue should always be so stated, whether the employer has proved that the respondent's (the workman's) incapacity was due to unreasonable refusal to undergo a surgical operation. If that is proved, the *onus* resting upon the employer, then the result is one way; if he fails to discharge that *onus* the result is the other way.

There is one other element in this case I desire to comment upon. It may not be sufficient for a workman to say that he was so advised. I think it is quite possible to figure advice given of a reckless, careless, peculiar, or indefensible nature by the workman's own medical adviser. But in the present case the remarkable fact is that the workman's adviser having been put into the box (as was most proper) he left it without apparently one word of cross-examination as to whether the opinion he had given to his client was a sound one.

In these circumstances, were there any question of balance of proof, it might be settled by this elementary consideration, that the employers' two medical advisers differed among themselves, and that the workman's medical adviser was not subject to a word of cross-examination directed to shake his opinion. I entirely agree with the conclusion which the learned Sheriff reached.

Their Lordships ordered that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Counsel for the Appellants — Sandeman, K.C. — Beveridge. Agents — W. T. Craig, Glasgow — Wallace & Begg, W.S., Edinburgh — Beveridge & Company, Westminster.

Counsel for the Respondent — Solicitor-General for Scotland (Murray, K.C.) — Crawford. Agents — A. C. Baird & Company, Glasgow — W. & W. Finlay, W.S., Edinburgh—Turner & Company, London.

Friday, December 17.

(Before the Lord Chancellor, Viscount Finlay, Lord Dunedin, Lord Atkinson, and Lord Shaw.)

CORSAR *v.* ARCHIBALD RUSSELL LIMITED.

(In the Court of Session, June 10, 1920, 57 S.L.R. 524.)

Master and Servant—Workmen's Compensation—Industrial Disease—Certificate of Certifying Surgeon — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8.

A workman on 21st April 1919 sustained injuries to his eyes and was admitted to hospital. On 9th June 1919 his right eye was removed. On 3rd July 1919 the certifying surgeon granted a certificate in which he stated that the workman was then suffering from ulceration of the corneal surface of the eye. He further stated in the certificate as a leading symptom of the disease that the workman had lost his eye as the result of corneal ulceration. An appeal to the medical referee was on 15th July 1919 dismissed by him on the ground that as the injured eye had been removed he could not say for what purpose the enucleation was performed. The arbiter, holding that the certificate was self-contradictory, and not such a certificate as was required by section 8 (1) of the Workmen's Compensation Act 1906, refused compensation. *Held* (*affirming* the judgment of the First Division, *diss.* Lord Cullen) that the certificate was valid for the purpose of entitling the workman to compensation under section 8, sub-section (1), of the Act.

Opinion per Lord Shaw that *Mapp* v. *Straker & Son, Smith Bros. Limited*, 1914, 7 B.W.C.C. 18, was not a decision which ought to be followed.

This case is reported *ante ut supra.*

Archibald Russell Limited appealed.

At delivering judgment—

Lord Chancellor — This is an appeal under the Workmen's Compensation Act 1906 by Archibald Russell Limited against the judgment of the First Division of the Court of Session in Scotland, pronounced upon a Stated Case in an arbitration between the respondents and the appellants, in the course of which a Stated Case was prepared by the arbitrator upon the requisition of the appellants.

The facts are extremely simple, and may be shortly stated:—James Corsar, a labourer, forty-one years old, was on the 21st April 1919 employed by the respondents in breaking up blocks of pitch for the manufacture of briquettes. On that day, alarmed by eye trouble, he left his work. He went as an inmate to the Glasgow Eye Infirmary, remained there for five weeks, and on the 9th June 1919 his eye was removed. On the 3rd July 1919 he obtained from Dr J. H. Murray, the certifying surgeon appointed under the Factory and Workshop Act 1901, the following certificate:—"I, ... hereby certify that, having personally examined James Corsar on the 3rd July 1919, I am satisfied that he is suffering from a disease to which the Workmen's Compensation Act applies, namely, the disease mentioned in the schedule below against which I have placed my initials, and is thereby disabled from earning full wages at the work at which he has been employed, and I certify that the disablement commenced on the twenty-first day of April 1919."

The disease in the schedule against which the certifying surgeon's initials are placed is "ulceration of the corneal surface of the eye, due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product or residue of any of these substances." Under the heading "Symptoms of Disease" the surgeon certified — "He has lost his right eye as the result of corneal ulceration."

The respondents appealed to the medical referee against the certificate of the certifying surgeon.