CHAPTER XXXV

CONDUCT AND POSITION OF MEDICAL WITNESSES

MANY medical practitioners when asked to furnish a report are somewhat uncertain as to their exact status, and of the amount of responsibility which they are incurring, and so, for fear of being worried by actions for libel or slander, refrain from frankly expressing their opinion about a workman's condition, as regards recovery from the effects of accident, or the reasonableness of the steps he may have taken, or failed to take, to hasten his recovery therefrom, when such expression of opinion is likely to prove detrimental to the workman.

A few remarks upon this subject, and upon the law of libel and slander, may not be out of place here.

Libel and Slander.—Of course, no man may disparage another without taking the consequences, and in certain circumstances and under certain conditions the disparagement may be actionable; but when a medical man is asked to report, either verbally or in writing, upon a case in which there is a dispute, he is at liberty—indeed, it is his duty—to express quite freely, and, if he chooses, in forcible language, his honest opinion.

It is important to note that the opinion, either verbal or written, must be given exclusively to those who are entitled to it.

Although in law there are technical distinctions between "defamation," "libel," and "slander," for ordinary purposes there is little real difference between them. W. Blake Odgers, K.C., Recorder of Bristol, in his well-known work on these subjects, states: "Words which produce any perceptible injury to the reputation of another are called defamatory. False defamatory words, if written and published, constitute a 'libel'; if spoken, a 'slander.'"

The learned author before mentioned states that a person has the right, *in certain circumstances*, to state plainly what he honestly believes to be true of another, and to speak his mind fully and freely concerning his character. In such circumstances the occasion is said to be privileged.

Privilege is of two kinds—qualified and absolute.

Qualified Privilege.—A person is protected by qualified privilege if he is speaking or writing of another honestly and *bona fide* for the public good, but we are here more particularly interested in the other and larger aspect of the matter, viz., absolute privilege.

Absolute Privilege.—This covers cases where the public service or the due administration of justice necessitate a complete immunity—*e.g.*, anything said by a Judge on the Bench, or by a witness in the box, or written *bona fide* by a medical man in his report or statement of evidence. In such cases the privilege afforded by the occasion is an absolute bar to any action.

Blake Odgers states that, where there exists between the parties such a confidential relationship as to throw on one person the duty of protecting the interests of the other, it is not only excusable but imperative that he be privileged in expressing his *bona fide* and honest opinion, although the other may not have asked him directly for it. Absolute privilege, he points out, extends to such a confidential relationship as exists between a solicitor and his client, between a principal and his agent, and, indeed, wherever any trust or confidence is reposed by one in the other, where it would be the duty of the one to volunteer information to the other, and where one of the parties could be justly reproached for silence.

Medical Reports Privileged.—Hardly any case comes more clearly within this rule than that of a doctor who is acting for an employer, or his representative, who asks for advice upon the condition of a man making a claim for compensation. Medical certificates or reports furnished by medical men *bona fide* and without malice, being of a confidential nature, are therefore privileged.

Statements made to a solicitor by a medical witness for the purposes of his proof are also absolutely privileged, as will

be seen from the following case which was decided in the Scottish Courts.

> Mrs. McEwan consulted a medical man, Sir Patrick Watson, of Edinburgh, with a view to obtaining evidence to obtain a judicial separation from her husband. Sir Patrick seems to have been consulted at a later period by the lady's husband with a view to giving medical evidence on his behalf, and against Mrs. McEwan. In due course a report was made to Mr. McEwan's solicitor, and Sir Patrick gave evidence at the trial. This Mrs. McEwan alleged was libellous and a breach of professional secrecy under Scottish law, as it was partly based on Sir Patrick's former examination when acting on her behalf. The Court held that no action would lie against Sir Patrick for the statements made in the witness-box, but allowed an issue upon the point as to making the statement or report to Mrs. McEwan's solicitor for the purpose of his proof of evidence prior to the trial.

This case was taken to the House of Lords, and the following is an extract from the judgment of the Lord Chancellor on the point:

Lord Halsbury: "By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a court of justice, is too well established now to be shaken. Practically, I may say that in my view it is absolutely unarguable; it is settled by law, and cannot be doubted. . . .

"It appears to me that there is but one point in this case—namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed." The other Law Lords concurred. (Watson *v.* McEwan, H.L., 1905, A.C. 480.)

In the case of Kennedy *v.* Hilliard (10 Ir.C.L.R. 209) Chief Baron Pigott said: "I take it to be a rule of law . . . a witness, in giving evidence, oral or written, in a court of justice shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel" (see also Munster *v.* Lamb, C.A., 11 Q.B.D. 604).

It is obvious, therefore, that a medical man may express his opinion quite freely, either in his report or in the witness-

box, upon any case submitted to him, provided the opinion is honest and *bona fide*, and given exclusively to those who called for the report.

If it can be proved that a medical man has acted maliciously, the statements complained of would not, of course, be *bona fide*, and it would, indeed, be difficult to see how privilege, qualified or absolute, could be pleaded.

Reports from Medical Officers of Institutions.—A medical man who is attending a patient in a public institution is in a wholly different position, when he is called upon to furnish a report upon a case under his care, from that of a private practitioner. An inmate of a hospital, infirmary, or any public institution gives a full account of the happening of the accident and submits himself freely to examination for the sole purpose of assisting the medical officer to effect a cure. It is obvious that under these circumstances for the medical officer in charge to betray to a third party a confidence thus obtained would be ethically wrong, and could not under any circumstances be defended on the grounds of privilege. Indeed, it requires no legal knowledge to appreciate that to give a certificate under these circumstances would be a flagrant breach of that confidence which our patients expect of us.

On the other hand, there can be no objection to the medical officer of an institution stating frankly and impartially his opinion of any case under his care, provided the person examined fully understands the object of the examination, and gives permission to the medical officer to furnish the report asked for.

Points a Medical Witness should Remember.—It is the duty of a medical expert to give opinions on medical subjects, and to draw deductions from facts which he has observed himself, or as to which documentary or other evidence has been placed before him. The medical witness should bear in mind that he must be able in every case to give reasons for his deductions; these are frequently asked for, not only in examination in chief but in cross-examination.

In spite of the statement sometimes cynically made, that it is the acme of diplomacy to tell the exact truth, for no one will believe it, one must take this risk, and at all times

and on all occasions be scrupulously precise, accurate, and fair.

When giving evidence on behalf of patients, medical witnesses are almost always faced with the unpleasant fact that, presuming on the friendly relationship which usually exists, they are expected to be partisan, and make the most of such injuries as their patients have suffered.

Preparation for Witness-Box.—The best preparation for the witness-box is a thorough and complete examination, which should be directed to discovering not only what is present but noting what is absent. A man died after receiving a blow on his head. The medical witness, when under cross-examination, admitted that at the post-mortem he had failed to examine the kidneys. It appeared that the deceased had been convulsed before death. The cross-examiner then asked this question, "Do you sometimes get convulsions in kidney disease?" to which, of course, the answer was in the affirmative. He then went on to ask: "Could convulsions in this case have been caused by kidney disease?" This of course also had to be admitted, with the result that the jury disagreed and the accused was acquitted.

The sequelæ of a former accident, or the existence of congenital defects, often influence the result of a case.

> D. Q. complained of inability to walk on account of alleged pain of many months' standing, the result of an accident to his right ankle. Very little evidence of traumatism being forthcoming, he was induced to strip, and a large suppurating gumma involving a fourth of the tibia of the left leg was discovered.

Absolute accuracy being essential, measurements should be made with a tape, not with the eye. Before entering the witness-box the witness should refresh his memory from standard works of authorities in order that his evidence may be accurate, and because excerpts from these books may be quoted. Clever counsel will often take isolated sentences and endeavour to use them to their own advantage, and familiarity with the context is the only means of reply. If a passage is quoted with which the witness is not familiar, he should ask to have the book handed to him, and he may be able to show either that the author is not a recognized one or that the work is out of date.

Those unaccustomed to giving medical evidence would be well advised to discuss the whole bearings of the case with a medical friend, preferably one of an argumentative disposition. In this way he may discover many of the points which will be raised against him.

Rules for Giving Evidence.—Much experience in the witness-box suggests the following rules to be observed in giving evidence:

1. Speak slowly and distinctly.
2. Watch the Judge's pen. When he stops writing resume your evidence.
3. Look at Counsel as he propounds his question, but direct your reply to the Judge and jury.
4. Answer the exact question put. If any explanation or amplification is necessary, the witness has a right to give it after having given a direct answer.
5. Seldom, if ever, use technical language ; if it is imperative to do so, explain it.
6. Make sure that your process of reasoning is abundantly clear.
7. Put aside all bias, and be absolutely candid. Remember that you have sworn not only to tell " the truth " but " the whole truth." This, I take it, refers to *suppressio veri*. Do not hesitate to admit a fact which may at first sight appear to be against your contention; you will probably be able to demonstrate that it is not so in reality. In any event it will demonstrate such fairness that the remainder of your evidence will have an enhanced value.
8. A medical witness should be scientifically exact, lucid, and succinct.
9. Remember that, in medicine at any rate, anything is possible, therefore get the credit of willingly admitting it.
10. Never give evasive answers.
11. Never guess.

Counsel sometimes attempt to force an answer in the direct affirmative or negative. Medical questions can be easily framed which, if answered by " Yes " or " No," would lend themselves to unfair inferences. An illustration of this type of question is: " Had the man recovered from his displaced kidney when you examined him ?" The correct reply would

be: "No, because in my opinion he had not suffered from that injury."

Many working-men adopt a line of conduct which almost seems to necessitate their being branded as malingerers; but in a public Court, where the communication is absolutely privileged, this should not be done without serious consideration, and only when one is prepared with incontestable evidence of fraud. However confident one may be that the plaintiff is grossly exaggerating, is untruthful, and is attempting to deceive the Court, it is unwise—indeed, it is unjust—to make the serious allegation of malingering unless it can be proved up to the hilt. Nothing I find pleases the plaintiff's counsel better than to get a medical witness to use the word "malingerer," for he knows that he can then appeal to prejudice.

What, then, is a medical witness to say when invited to use the word "malingerer" in a case where there is only a strong suspicion of malingering? One may say with truth that he is not a malingerer; and when asked, "If, as you say, this man is not a malingerer, and if you disagree with his doctor's evidence, which is to the effect that he is still ill, why, then, does he not return to work?" the reply is that he is "weak-willed, and will not face the necessary inconvenience, perhaps the small amount of pain, which he must have whenever he starts work."

It would be perfectly fair in a case of this sort to explain that the plaintiff is an "irresolute sort of individual, who has, and will continue to, put off actually starting work, because he feels that he is likely to suffer some inconvenience, which a reasonable man would put up with, and which probably would only last a few days."

If asked whether a malignant disease, which has been discovered after an accident, is the result of that accident, the only answer which an honest witness can give is that as science has not yet discovered the cause of cancer, he is not prepared either to deny or affirm that a malignant growth may be caused by an accident, provided, of course, that its appearance and other circumstances do not point to its dating from before the accident.

I think, however, when it is alleged that a malignant growth found *after* an accident was caused by it, one ought to qualify

the admission of possible causal relationship by stating that science has not adduced conclusive evidence to support the theory that trauma is an undoubted factor in the etiology of malignant disease.

It is a habit with some counsel to frame a question purporting to be based upon an answer which has been elicited, but with just that slight alteration in the adjective used which may subsequently make all the difference at the crucial stage of a case which is hanging in the balance. This must never be allowed to pass—the correction should be made at once.

Above all, never lose your temper, however irritated. Remember that the object of cross-examination is to test your knowledge or your candour. It always pleases cross-examining counsel if he succeeds in making a witness angry. Do not be offended if counsel insinuates that you are a gross perjurer, or the Judge sums up with an insinuation that you are either very unobservant or much misguided. Remember that the case must go against somebody, and that, if you do have these pleasantries levelled at your head, your medical friend who is opposed to you has been saved what he possibly might have been foolish enough to take seriously.

Proof of Evidence.—When proofs are prepared and sent by a solicitor, they should invariably be carefully compared, sentence by sentence, with the facts set out in the medical report furnished, a copy of which should always be kept. The introduction of a few mild adjectives reinforcing the original statement will not be noticed unless this is done, and sometimes the solicitor disregards, for reasons of his own, the suggestions of the medical examiner, which may place the latter in difficulties in the witness-box, as might have happened in the following case:

> Some time ago I was asked by the medical superintendent of an institution to examine an employee who, having been injured, was claiming damages for personal injuries. He had apparently recovered from the original injury, but was suffering from a chronic disease which had been accelerated by the accident.
>
> The defence was that the man had never received anything more than a sprain, from which he had long since recovered, and that his present condition was wholly due to pre-existing disease.
>
> Examination showed evidence of an indefinite callus at the lower end of the left tibia, which, taken with the history, was presumptive

evidence in favour of a fracture having occurred as the result of the accident. Neither the medical superintendent who represented the institution nor the man's own doctor seemed to have recognized the condition.

I advised that an X-ray photograph should be taken, and pointed out in my report to the solicitors that I could give no definite opinion without it, that we ought to know the worst before going into Court, and that in any case, if we did not procure a skiagram, I should be confronted in the witness-box with a more or less imperfect one taken at the instance of the plaintiff.

My request, however, was ignored, and five months later the solicitors who were acting on behalf of the defendant institution wrote to me stating that the case was now coming for trial in the High Court. They sent me a proof, based upon my report, of what they concluded would be my evidence, in the last paragraph of which I was expected to say that without an X-ray photograph I could not with any certainty say whether a fracture had taken place ! To this I replied referring them to my report, in which I had advised that a photograph should be taken. Arrangements were now made for this to be done, which divulged the fact that a fracture was present. I learnt afterwards that the plaintiffs had in fact procured a radiograph on their own account.

CHAPTER XXXVI

MEDICAL ASPECT OF THE WORKMEN'S COMPENSATION ACT, 1906

I PROPOSE to deal with the provisions of the Act as regards (1) the employer's right to medical examination of a workman; (2) the workman's rights in relation to medical examination; (3) the refusal of a workman to undergo an operation; and (4) cases decided upon application to revise or terminate weekly payments.

I. The Employer's Right to Medical Examination of a Workman.

What rights are conferred upon employers by the Workmen's Compensation Act, 1906?

The Act provides as follows:

> *Schedule I.* (4). 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 the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place.

It should be observed that this provision applies only where notice of the accident has been given, and where no weekly payment is being made.

The following provisions apply to cases of weekly payments:

> *Schedule I.* (14). Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the

same, his right to such weekly payments shall be suspended until such examination has taken place.

(15). A workman shall not be required to submit himself for examination by a medical practitioner under Paragraph 4 or Paragraph 14 of this Schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations.

There are other requirements in the Act with regard to a workman submitting himself for medical examination to a medical referee, but we are not concerned with this point at the moment.

The Regulations made under the Act by the Secretary of State with respect to medical examinations provide that —

1. Where a workman has given notice of an accident or is in receipt of weekly payments, the medical examination shall be made at reasonable hours.

2. Where he is in receipt of weekly payments he is not required, after one month from the date of the first payment of compensation, or, if the first payment is made under an award, from the date of the award, to submit himself for examination, except at the following intervals: Once a week during the second, and once a month during the third, fourth, fifth, and sixth months, and thereafter once every two months. If an application is made after the second month to review the weekly payment, then he may be required to submit himself to one additional examination.

No. 55 of the original Regulations made under the Act deals with the procedure to be adopted where the workman refuses to submit to a medical examination, and, shortly stated, it entitles the employer to apply to the Court for a suspension of the workman's right to compensation, or his right to take proceedings under the Act, until he submits to an examination. Where the right to compensation is suspended, no compensation is payable in respect of the period of suspension. This is provided by Schedule I. (20), which is as follows:

Where, under this Schedule, a right to compensation is suspended, no compensation shall be payable in respect of the period of suspension.

It is essential to note that the Regulations made under the Act have the same force and effect as though they were actually embodied in the Act itself.

Revision of Weekly Payments.—In considering the question of malingering, an important provision is contained in the Act,

which gives the right to either party to apply to the Court for a revision of the weekly payments. This provision is contained in Schedule I. (16), and is as follows:

> Any weekly payment may be reviewed at the request either of the employer or of the workman, and, on such review, may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.
>
> Provided that, where the workman was, at the date of the accident, under twenty-one years of age, and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding £1.

Thus the employer, where malingering is suspected, can apply to the Court to review the weekly payment.

It would seem that the following deductions may be drawn from the decisions in the cases hereinafter detailed :

1. The employer cannot be required to pay a fee for the attendance of the workman's doctor if he attends the examination.

2. The workman has no absolute right to have his doctor present at an examination, although in many, if not in most, instances it is not unreasonable that he should be present, and in some cases it is even desirable.

3. The County Court Judge or Arbitrator is to decide whether it is reasonable for the workman to require his doctor to be present.

4. A solicitor's office, or other place of business, is not a proper place for medical examination, and the workman's solicitor is not entitled to be present.

5. It is not unreasonable for the workman to require the examination at his own place of abode or at the residence of his own doctor ; that is, he is not bound to attend at the residence of the employer's doctor.

Decisions and Precedents.—Many medical men do not appreciate the effect of the decisions of inferior Courts, and what the procedure is when an attempt is made to reverse a decision. A brief note of the procedure may therefore not be out of place.

Sometimes a decision is given by a County Court Judge in

a particular district which is not on the same lines as a decision by another County Court Judge in another district where the facts and circumstances are similar. Decisions in the County Courts are rarely reported, but when such cases involve important principles they sometimes appear in the newspapers. These reports are, however, of no legal value, and, generally speaking, they are only of interest to the general public, as one County Court Judge is not bound by the decision of another Judge of a County Court.

The decision of a County Court Judge in a case under the Workmen's Compensation Act upon a point of law only—that is, *the effect of the provisions of the Act as applied to a finding of fact*—can be challenged by appeal to the Court of Appeal, and the decision of that Court can again be tested by an appeal to the House of Lords.

The decisions of the Superior Courts in which important questions of law are involved are usually reported in the recognized law reports, and are therefore available for reference in future cases; and such decisions are binding upon the Judges of the Courts of equal and, of course, inferior jurisdiction. If, therefore, the Court of Appeal has given its decision upon a certain point, and the facts in a subsequent case are similar, or cannot reasonably be distinguished from those in the case previously decided, the Court considers itself bound by its previous decision, and applies it to the later one. This is what is generally spoken of as being bound by and following a former decision, and only the House of Lords can overrule it.

Grounds of Appeal.—What a County Court Judge or Arbitrator finds as a fact will not be interfered with if there is evidence upon which he can reasonably so find. If, for instance, a County Court Judge finds as a fact that a man who was known to be suffering from aortic regurgitation died whilst at his work, and that his death arose out of, and in the course of, his employment, provided there is evidence to support the finding, neither the Court of Appeal nor the House of Lords can override the decision, inasmuch as the law is that the County Court Judge who investigates the facts is the sole judge of what the facts are.

The Court of Appeal and the House of Lords can, and do

reverse decisions on points of law, but with these this work does not concern itself.

Interesting Decisions.—The procedure under the Workmen's Compensation Act is laid down in the schedules of the Act, and the Regulations made by the Secretary of State, and where these require elucidation, the law, on particular points, is made, or more correctly speaking explained, by actual cases which come before the Courts.

It is my intention, therefore, to quote a few leading cases (several of which I was personally interested in) that have decided important questions with regard to the time, place, circumstances, etc., under which medical examinations under the Workmen's Compensation Act should be conducted.

Until quite recently some solicitors demanded that their clients should be examined at their offices, where, in many cases, there was not even the semblance of accommodation for a proper medical examination. To this objection was added the inconvenience, and what to many medical men would be the embarrassment, of the presence of a solicitor or his clerk, who was apparently instructed to assert his authority by interrupting the examination by such exclamations as " Don't answer that question," when the legal gentleman in question, or his representative, considered that his client was likely to make some admission adverse to his case.

It is perfectly obvious that there are often circumstances connected with the occurrence of an accident which the medical examiner ought to be made fully aware of before he proceeds with the examination, and whilst it is clearly not his duty to get or use any information of a legal nature, it is unfair and indeed improper that a medical examination should be hampered by restrictions of this sort.

It was, therefore, to bring to a head a state of affairs which was both embarrassing and humiliating that I took a stand in one or two of the cases about to be recorded, the result of which was of the greatest possible benefit to the profession, for several of these cases were taken to the Court of Appeal, and the decisions thus obtained have swept away all those petty hindrances and humiliations which most of us felt to be intolerable.

When a claim is made against an employer, ample provision is made under the Workmen's Compensation Act for facilities

being granted for medical examination as to the validity of the claim and the extent of the workman's injuries. But the right to require a workman to submit to medical examination is *confined to the employer*.

A workman may receive an injury arising out of and in the course of his employment through the culpable negligence of a third party. For instance, a pavior may be run down by a passing taxicab. Here the workman has an undoubted claim against his master under the Workmen's Compensation Act, but he also has a claim at Common Law against the taxicab driver or *his* master. He can *claim* against both, but cannot *recover* against both. He has therefore to elect which he will proceed against. By *claiming* against both he preserves his right against his employer in case he fails in his claim against the third party.

If he elects to receive compensation from his employer instead of proceeding against the person liable for the injury he has received, the employer can proceed against the third party who caused the injury, to recover the amount he has paid or may have to pay to his workman.

If the injured workman elects to accept compensation from his employer he only receives half-wages, whereas if he proceeds against and recovers damages from the third party who injured him he would be entitled to a sum representing his loss of wages and an additional sum for pain and suffering.

It is obvious that the former method is the easier, safer, and quicker way of obtaining some redress, and has the advantage of providing an impecunious man with ready-money, especially if he should think it doubtful whether he can prove negligence against the person who actually injured him.

Sometimes a workman who has been injured by a third party finds he is unable to keep himself, and possibly a family, whilst waiting for his case against the third party to be heard; and it is open to the employer to assist him by paying a weekly sum, say half-wages, as a loan to be repaid out of any compensation he recovers from the third party. There is no danger to the workman if this course is followed, provided the payments are not *paid as compensation* under the Act. It has been held that such payments are not payments coming within the Act. If the payments made to the workman had been

made under the Act, without the reservation as to his rights against third parties, he would have *recovered* from his employer under the Act, and therefore could not recover from the third party. If the workman's case against the third party should fail, the sums advanced by way of loan can be set off by the employer against the compensation he would become liable to pay the workman consequent upon his failure to recover against the third party. This course is frequently adopted, because it assists the workman to recover adequate compensation, and if he succeeds it relieves the employer from liability under the Act. The only risk is that the workman may not repay the money advanced when he gets his compensation, but this can be guarded against if proper precautions are taken.

Now, though the party who actually did the injury (known as the " third party ") may be called upon to indemnify the employer, there is no provision to enable him to insist upon a medical examination taking place, and it may very well be that he may suffer in consequence.

A case recently came to my knowledge in which a workman was injured under circumstances which gave the man's employer a right of indemnity against a third party, and naturally the latter desired to have the injured man medically examined to ascertain whether the sum claimed was a proper one. But the man declined to submit himself to examination by a medical man sent by the third party. There was nothing to compel him to do so under the Workmen's Compensation Act, as the third party was not the man's employer, and the man himself was not a party to the proceedings.

Of course, such an examination could be obtained at the special request of the employer; but if the employer declines to exercise this right in the interests of the third party, the latter may be unable to obtain any information as to the man's physical condition.

II. The Workman's Rights in Relation to Medical Examination.

No fee is payable by the employer for the attendance of the workman's doctor at an examination. The following case, which went to the Court of Appeal, is my authority for the foregoing statement:

A workman who met with an accident was required by his employers to submit himself for medical examination. The Arbitrator, before whom proceedings were pending, made an order for the examination, but on condition that the employers bore the expense of the attendance of the workman's medical man at the examination. The employers appealed against the decision of the Arbitrator, and the Court of Appeal held that he had no power to impose such a condition, and allowed the appeal (Osborn *v.* Vickers, Sons & Maxim, 1900, 2 Q.B., 91).

Surprise Visits.—It occasionally happens that when malingering is suspected it may be best to make a surprise visit.

In 1908 a case came before His Honour Judge Mulligan, at the Swaffham County Court, in regard to a dispute which had arisen under the Act of 1906, in which it transpired that a medical man had made an examination of the workman without giving him notice of his intended visit, so that he could notify his medical attendant. Upon this point the learned Judge made the following statement:

"Another question of general interest to litigants on this circuit arose, and in this way: Dr. Watson, being aware that Purse [the workman] was a patient of Dr. Alexander's, thought it right to make a surprise visit at 2 p.m. on December 17, when he found Purse alone and in bed. Mr. Keefe says that this was contrary to a rule of etiquette prevailing in the medical profession; that Dr. Watson should have informed Dr. Alexander, so that the latter might accompany him, and that Dr. Alexander should be compensated by an increased or qualifying fee. Now, when a second doctor is called in by a patient, or his friends, to advise or to treat that patient, I can well understand that the first doctor should be informed and meet the second (except in urgent cases). Such a rule would, if I may say so with respect, seem just in principle and beneficial in practice. But I do not see how that principle can apply when a strange doctor is going, not for the purpose of advising or treating the injured, but to make an examination on behalf of a third person. On the contrary, if a doctor be requested by a master to ascertain the condition of an injured workman with a view to resisting a claim for compensation, it may be the duty of that doctor to make a surprise visit at a reasonable time. A doctor so requested must exercise his discretion, with which this Court is loth to interfere. I find no ground for any complaint against Dr. Watson" (Purse *v.* Hayward, 125 L.T., 11, and 1 B.W.C.C., 216).

Presence of Workman's Doctor.—It is obviously not an unreasonable request on the part of a workman that his medical man should be present at the examination if the County Court Judge or Arbitrator does not, upon the evidence before him, decide otherwise.

It is open, however, to a County Court Judge or Arbitrator to

decide, upon evidence, whether under the circumstances of any given case a workman is reasonable in requiring his doctor to be present.

In 1909 a case came before the Judge of the Durham County Court in which a workman, who had met with an accident arising out of, and in the course of, his employment was required to submit himself for examination by a medical practitioner in accordance with the provisions of the Act. The workman expressed his willingness to submit to an examination, but only upon condition that his own medical adviser was present at the time, and the County Court Judge held that this was not a refusal to submit to the examination. The employers appealed against this decision, and in the course of the argument in the Court of Appeal Lord Justice Farwell stated that reasonableness was a factor in these cases, and it was a matter for the County Court Judge; and Lord Justice Kennedy observed that at the most this would be only delay, and not refusal.

The Master of the Rolls held that the conduct of the workman did not amount to a refusal, the other Lords Justices concurred, and the appeal was dismissed (Devitt *v.* Owners of s.s. *Bainbridge*, 1909, 2 K.B., 802, and 2 B.W.C.C., 383).

It would appear that, in the opinion of the Court of Appeal, it is not unreasonable for a workman to demand that a medical examination at the instance of his employer shall take place at his own doctor's residence, but that it is unreasonable to demand that the examination shall take place at the solicitor's office.

Solicitor's Office Unsuitable for Examinations. — Under the award of His Honour Judge Bacon, sitting at the Whitechapel County Court in 1910, the employers of a workman who was injured whilst engaged at his work were ordered to pay a weekly sum of fifteen shillings. After a time the employers required the man to submit to a medical examination, and he was requested to attend at the employers' doctor's residence in London. The workman, through his solicitor, declined to attend at the doctor's residence, on the ground that it was a matter of physical impossibility for him to do so; but his solicitor stated that the man would only submit himself for examination at his (the solicitor's) office.

It was pointed out by the employers' solicitors that the workman had been able to attend at their offices regularly to receive his weekly payments, but the workman's solicitor insisted upon the examination taking place at his office. The employers' solicitors again required the man to attend at their doctor's residence, and sent ten shillings to cover his cab fare. This was, however, returned by the workman's solicitor, who then offered to allow the examination to take place either at his office or at the surgery of the workman's doctor. The

employers refused to agree to either of these proposals, and stopped the weekly payments, so the matter came before the County Court Judge, who held that no refusal to submit to medical examination within the meaning of the Act had taken place. The employers, however, appealed against this decision, and, in the course of the proceedings in the Court of Appeal, Lord Justice Fletcher Moulton said: "It seems to come to this: he [the workman] insisted that you [the employers] should come to him, and you that he should come to you. I don't see there is a pin to choose between you on the merits." Lord Justice Farwell remarked: "The solicitor's letter claiming the right to have the man examined at his office is simply preposterous"; and the Master of the Rolls said: "Speaking generally, I do not think that a medical examination ought to be conducted at a solicitor's office, nor at any other business place, because, necessarily, there are no such medical appliances at a business office as there would be at a surgery, nor the same conveniences in an office for stripping and examining a sick man, but to some extent, no doubt, the question would be affected by the nature of the workman's incapacity."

In the result the appeal was dismissed on the ground that the workman had not refused to submit himself for examination or obstructed it; that both parties had taken a wrong view; there was no law prescribing where the examination should take place, and, as long as the man offers to submit to examination, and is not unreasonable in saying where it shall take place, he cannot be punished in the manner in which he might be if he acted otherwise (Harding *v.* Royal Mail Steam Packet Company, 4 B.W.C.C., 59).

The following case I record with some hesitancy, as it refers to myself, but it so strongly emphasizes the right of the medical examiner to refuse to examine at a solicitor's office that I feel I am not justified in omitting it:

A case came before His Honour Judge Woodfall at Westminster County Court in 1910, on an application by the employers for a stay of proceedings against them, and the suspension of the workman's right to compensation until he should submit himself for examination by the respondents' doctor. The workman refused to submit himself for examination by the medical practitioner provided by the employers, except upon condition that the workman's solicitor should be present at the medical examination. It was alleged on behalf of the workman that this condition was necessary because of the behaviour of the medical man, selected by the employers, to workmen examined by him.

His Honour, after hearing the evidence, stated that he must accede to the application, and proceeded as follows:* "I really have no

* This report is given in full because otherwise it might be suspected that the lacunæ concealed unpalatable truths.

evidence on which I can say that the workman here has any reason, apart from his personal dislike, to refuse to be examined by Dr. Collie. I have seen a good deal of this doctor here. He has given evidence in a great many cases, and I am bound to say there have been a great many cases where his evidence has been very damaging indeed to the workman. It does not always carry the day. He has only given his medical opinion, and I can understand workmen do not like to be examined by him. But what I have to consider is: does he act fairly as a medical man? And I cannot say he does not. It is said that he asks questions as to what compensation they will take. I have no hesitation in saying that, if a doctor does that, he is going beyond his duty, but he has never done it before me. I have no evidence of it. There has never been a case in which such a thing has been suggested. I have nothing to do with what has taken place elsewhere. All I can say is as to what has taken place before me in this case, and I do not think one can decide it on the hypothesis, the general effect of which is: whether you would allow a layman to be present when it was a case of a woman. What I have to consider is whether this workman is unreasonably obstructing.

"What is the man's own evidence? He does nothing more than say he spoke sharply to him. I think that is perhaps very likely, Dr. Collie is a man who is, perhaps, peremptory in his manner. All the other things he complains of are: that he told him not to use a stick. That is Dr. Collie's opinion. It may be it is wrong. It may be the man felt, and honestly felt, that he could not get along without the stick; but that is the doctor's opinion. I have no ground for saying it was not an honest opinion. He told him to leave his bandage off. The same thing applies there. The man says: 'I do not care if any other doctor told me to leave my bandage off; I should not do so.' That may be very likely. Again, it is a matter of medical opinion. The doctor advised him to leave the bandage off, as he thought he did not want it. The workman feels he does, and continues to wear it. That is no ground for saying the doctor is so unfair in examination that a workman can refuse to be examined by him. It seems to me to be going a very long way to say that the defendants are not to have the services of their own medical officer, who is a man of great skill, and of obvious ability. The defendants are entitled to his services. I see no ground for saying the workman has any just cause or reason for refusing to be examined by Dr. Collie in the presence of another medical man. The question is whether the examination is to take place in the presence of laymen. I can only say, speaking as a layman, that it is a preposterous thing to say that a layman is to be introduced to a medical examination. Dr. Collie is the only medical gentleman who has given evidence, but he confirms that view, speaking for the medical profession. It seems to me open to every objection to have a layman present, and entirely contrary to our own experience, when we consult our medical man. He will not allow a layman to be present.

"It is said that the workman must be protected. He is protected,

The Act protects him. It says: You may if you like have your own medical man present, and it shall not be held to be an obstruction if you insist on having your own medical man. It is said that the doctor may be young and will be overwhelmed. I do not know who the doctor may be; I do not know whether he is a man of such inexperience that he would be overwhelmed, or, indeed, that Dr. Collie would overwhelm him. But I must say that such a consideration as that appears to be one I cannot entertain. I must assume there will be a properly qualified medical man present on behalf of the applicant. That being so, if the workman refuses to be examined, I must accede to this motion and stay the proceedings" (Perry *v.* The London County Council, 129 L.T., 360).

An order was made by His Honour staying the proceedings, and also suspending the right of the workman to compensation.

About two months after this case was decided the workman's solicitors wrote stating that he was prepared to submit himself for examination by the employers' doctor, and asked to be informed when and where the examination was to take place. He was asked to attend at my residence at a certain time, and a small sum for travelling expenses was forwarded to him. He attended the appointment, and as a result of my report, my opinion being confirmed by another medical man, no further payment was made to the workman.

Another case raising practically the same question (in which the solicitors engaged in the previous case also acted for the workman) came before His Honour Judge Bray at the Clerkenwell County Court in 1910.

In this case the workman, upon being required to submit to an examination either at the residence of the employers' doctor, at the man's own house, or at the residence of his own doctor, refused to see the particular doctor selected by the employers, except on condition that the examination took place at his solicitor's office, or, if at the doctor's residence, then only in the presence of his, the workman's, solicitor, the reason for this condition being that the particular doctor (myself) selected by the employers was alleged to have treated other workmen brutally, and as shammers and malingerers.

The objection of the workman's solicitor to the employers' doctor was, as regards the allegation of brutality, based upon information said to have been given by several workmen during a period of four or five years, the brutality being that he called the men shammers and malingerers, and one man said he "treated them like dogs." The use of the electric battery, it was said, sometimes caused unnecessary pain, and it was further alleged that his opinions were prejudiced and therefore untrustworthy, and his statements inaccurate and unreliable; also that he had examined a workman without proper notice to the solicitors, and on another occasion endeavoured to induce the workman to agree to terms without consulting his solicitor.

His Honour found that the allegations against the doctor were not

proved, and that the workman's conditions were so unreasonable as to amount to a refusal to submit himself for examination, and therefore made his award in favour of the employers.

In giving his reasons for the award, His Honour said, even if he assumed that the particular complaints and allegations were well founded, he was unable to see how the presence of the workman's solicitor would be a more efficient protection to him than that of his medical man, who, in fact, could observe far more intelligently than a solicitor what was being done. His Honour also pointed out that the doctor who was called for the workman had said that there was no necessity for a lawyer's presence if a doctor were present, and that the workman's doctor should always be there. His Honour also stated that he had assumed the charge of brutality and other allegations were well founded, but he was satisfied they were not; that there was, in his opinion, no real foundation for the charge of brutality, and, although the doctor might have expressed strong opinions upon the prevalence of malingering, and sometimes have mistakenly charged a man with shamming or malingering who, in fact, was not so doing, and although a man might well resent the suggestion, it was unfair and unreasonable to base upon this a serious charge of brutality. There was no objection, in his opinion, to the use of the battery on the ground that it caused unnecessary pain.

With respect to the other allegations, the doctor's opinions might often be mistaken, and his recollection of what passed at the interviews might be defective, but that he improperly examined a workman behind the solicitor's back, or improperly tried to induce a workman to settle without consulting his solicitor, was, he was satisfied, untrue. The offer by the employers to have the examination in the presence of the workman's doctor was a reasonable one, and the solicitor's presence was quite unnecessary for the workman's protection.

In considering what is a refusal to submit to examination under the Act, His Honour stated that, in his view, so long as a workman was willing to submit himself under reasonable and unobjectionable conditions, there was not a refusal; but he found that the conditions required by the workman were objectionable and unreasonable, and that there was a refusal to submit to medical examination within the meaning of the Act.

The workman appealed against this decision, and in the course of the proceedings the Master of the Rolls said: "I think, speaking for myself, that a solicitor's office would be the worst possible place for the workman to be examined at. The Judge has found that the presence of the solicitor was not necessary for the protection of the workman. How can we say he was wrong?" He expressed the opinion that the facts did not justify the contention that the solicitor should be present at the examination.

Counsel for the employers were not called upon to argue the case, and, in giving judgment, the Master of the Rolls said:

"It is rather curious that in the case we have just decided"—

i.e., Harding *v.* Royal Mail Steam Packet Company, 4 B.W.C.C., 59—"I should have expressed the opinion that it cannot be too well known that a solicitor's office is not, in ordinary circumstances, a proper place at which to hold a medical examination of a workman. And I can only emphasize what I there said on that point.

"This is an attempt by the workman's solicitors to dictate to the employers where the man shall be examined by their doctor. By Paragraph 14 of Schedule I. of the Act, it is clear that if the workman is required by his employer, during the period in which he is receiving compensation, to undergo a medical examination, the workman must, from time to time, as required, submit himself for such examination by the duly qualified medical practitioner who is to be provided and paid by the employer. The Act gives the employer, therefore, the sole right to select the medical man who shall examine the workman; it does not give the workman any right to impose conditions such as are claimed here. I agree with the County Court Judge's admirable judgment. The appeal fails."

The other two Lords Justices expressed their concurrence in the views expressed by the Master of the Rolls (Warby *v.* Plaistowe and Co., 4 B.W.C.C., 67).

The effect of this case clearly confirms the previous decision—that a solicitor's office is not a proper place in which to require the medical examination to take place, and that the presence of the workman's solicitor thereat is not necessary, nor is it a reasonable requirement on the part of the workman.

The *Lancet* (March 25, 1911), in commenting on these cases, remarked:

"Apart from the interest of these cases to medical men who may be called upon to make such examinations as Dr. Collie was asked to make, it is satisfactory to note that that gentleman's conduct has been completely vindicated by both Judge Woodfall and Judge Bray, in whose courts discussion took place with regard to it, and before whom the serious allegations referred to with regard to it were made."

And the *British Medical Journal* (April 29, 1911) made the following statement:

"To sum up the result of these cases, the employer's doctor cannot always insist on conducting an examination at his own surgery, but he is justified in refusing to examine a workman in a solicitor's office or in the presence of a solicitor. For the part which he has taken in obtaining definite pronouncements on these points, the profession would appear to be under considerable obligation to Dr. Collie."

Another case upon this point came before the Scottish Courts in 1910.

In this instance a workman, having made a claim under the Act of 1906, was required to submit to a medical examination, which the workman refused to do except upon condition that his own doctor was present at the examination. The Sheriff (the arbitrator) before whom the matter came, and before whom it was conceded that there were no special circumstances in the case which called for the presence of the workman's medical attendant, held that the workman, by insisting upon the condition referred to, had refused to submit to examination; and the workman appealed against this decision.

The Lord Justice Clerk, in the course of his judgment, said he took it that the workman came to the Court as the representative of the whole class of workmen to have it decided whether a workman was entitled *as matter of right* to refuse to submit himself for examination unless his own medical man were present, and, that being the question, he had no hesitation or difficulty in deciding that the workman was not so entitled, and, in his opinion, the medical man making the examination ought to be allowed to make it—except in special circumstances—without being interfered with by anybody, or watched by anybody, provided the employer employed a proper medical practitioner well qualified to make the examination and to supply a report. His Lordship pointed out that where it might be dangerous to the workman to undergo the examination without the doctor being present who knew him and knew the state of his health and constitution, and who, if anything was being done in the course of the examination, could suggest that something ought to be done, or ought not to be done, such circumstances as these might justify the condition being imposed that the workman's medical man should be present, but those special circumstances did not arise in the case before him, and the appeal was dismissed.

From this decision the workman appealed to the House of Lords, but the appeal was dismissed, the decision of the arbitrator and the Court of Session being upheld by three of their Lordships, Lord Shaw dissenting.

Earl Loreburn, the Lord Chancellor, stated that the question seemed to him to be whether or not one side or the other had acted reasonably in a particular case, which was a question of fact for the arbitrator; but his Lordship inclined to the view that in most cases, perhaps in nearly every case, it was quite reasonable on the part of the workman to desire the presence of his own doctor, although sometimes it might be unreasonable because of inconvenience or expense, or for other reasons; but there was no absolute right in the workman to have his doctor present at the examination.

Lord Atkinson concurred in the Lord Chancellor's view, but considered that the burden of proving that the workman's request was unreasonable was not thrown upon the employer, but that the workman had to prove that his request was reasonable.

Lord Gorell concurred in the previous judgments, and pointed out that under the statute the employer had the right to have the examination in order to see what his position was, and the workman had

to submit to it, and if he raised any objection by reason of his desire to have his doctor present he raised a condition, and it was for him to justify it.

Lord Shaw, however, dissented from the judgments of the other Law Lords, and considered it was reasonable for the workman to require the presence of his own doctor, and that it was for the employer, denying the right of the workman, to establish that his denial was a reasonable one (Morgan *v.* William Dixon, Ltd., 1912, A.C. 74, and 5 B.W.C.C., 184).

This is the latest case that has come before the highest tribunal upon this point, and the effect of it appears shortly to be that the workman has no absolute right to have his doctor present at the examination, but that, generally speaking, it is not an unreasonable requirement, although in some cases it may be, and that the reasonableness is a question of fact for the County Court Judge or Arbitrator to decide, and for the workman to prove.

III. The Refusal of a Workman to undergo an Operation.

Broadly speaking, the following rules may be laid down as warranted by judicial decisions in the cases hereafter quoted. These cases are of much interest and of considerable difficulty ; they not infrequently occur in practice, and deserve notice :

1. A workman may forfeit his right to compensation if he refuses to undergo an operation which is necessary to restore his condition, provided it does not involve any great risk.

2. The workman must act reasonably in the circumstances of the case, or forfeit his right to compensation.

3. If the workman is *bona fide* advised not to undergo an operation, generally speaking, it would be reasonable for him to refuse.

4. The question whether the workman's conduct is or is not reasonable in the circumstances is a question of fact for the County Court Judge to determine upon the evidence before him : he has not merely to decide whether the operation is one which the workman should have undergone.

5. The onus of satisfying the County Court Judge is upon the employers if they contend the operation is necessary, unattended by serious risk, and likely to be successful.

In the year 1908 a question was raised before His Honour Judge Mulligan, sitting at the North Walsham County Court, as arbitrator in a case under the Act of 1906, whether a workman who was in receipt of weekly compensation had, by his conduct, disentitled himself to a continuance of the compensation in consequence of his refusal to submit to an operation, the employers contending that he had become so by refusing to undergo the operation. The employer's doctor and the workman's doctor were both of opinion that the workman's eye, which had been injured by the accident, should be removed in order to prevent possible affection of the uninjured eye. The workman, who stated he was adverse to anæsthetics, declined to undergo the operation. His Honour, in giving judgment, said: " I do not see anything in the statutes requiring a workman to submit to such an operation. I cannot add a new ordeal, trial by ' Lancet,' to the words of the Act, and therefore hold that his refusal affords no ground of defence " (Nudd *v.* Riches, 125 L.T., 90).

This case does not appear to have been carried farther.

The following case decided that a workman cannot be required to undergo an operation where serious risk is involved :

A question relating to the obligation (or otherwise) of a workman, who had sustained injury arising out of, and in course of, his employment, to undergo an operation, came before the Judge of a County Court, and subsequently before the Court of Appeal. The evidence of the doctors showed that there was a serious element of risk attending the operation, and the County Court Judge held that the workman was not bound to submit to it. When the matter came before the Court ot Appeal at the instance of the employers, after hearing arguments by counsel for both parties the Master of the Rolls expressed the opinion that there was nothing in the Act which cast an obligation upon the workman to undergo an operation, and pointed out that the risk likely to attend the particular operation was serious, and the appeal was dismissed (Rothwell *v.* Davies, 19 T.L.R., 423, and 5 B.W.C.C., 141).

The decision in the following case confirms the view that the real question to be considered is whether the workman's conduct was or was not unreasonable :

A workman had his little finger crushed in an accident whilst at work. Part of the finger was amputated, but slight adhesions remained after the wound had healed. The employers contended that the man was fit for work, and that work would be beneficial to him, inasmuch as, by working, the adhesions would be broken down; also that the condition of the man's finger was due entirely to his refusal to use it. A few days before the case came before the County Court Judge, the man underwent another operation, and a further part of

his finger was taken off. The County Court Judge held that the man was fit for work, and that his refusal to work was the cause of the condition of the finger, and unreasonable, and reduced the weekly payment to one penny. The workman appealed to the Court of Appeal, who reversed the decision of the County Court Judge. The Master of the Rolls, in delivering judgment, said if the man had been told that he must either go back to his old work, and at the cost of great pain and suffering for a considerable time break down the adhesions, or that he must submit to a second operation, and he had said he would do neither, it would have been quite proper for the County Court Judge to say he had acted unreasonably, and that his continued incapacity was due not to the accident but to his refusal; but such was not the case. His Lordship also stated that there was no evidence that the workman had acted unreasonably, and he declined to accept the view that a man who had not had medical advice on this point ought to, of his own knowledge and his own will, have undergone great pain by resuming his old work, when he could not possibly foresee that the great pain which would be produced might be beneficial instead of most injurious to the finger (Burgess *v.* Jewell, 4 B.W.C.C., 145).

The following case very clearly endorses the view that, if the operation necessary to restore the man's condition is one that does not involve any great risk, the workman must undergo it or forfeit his right to compensation :

A workman employed by an engineering firm injured his right foot in February, 1907. He was treated in hospital, and, after two or three small operations, the big toe and part of the second toe were removed. An X-ray photograph disclosed that a piece of bone had been detached from the big toe, and was then loose in the stump. He was offered light work in January, 1908, which he refused, and compensation, which had previously been paid, was stopped. A temporary arrangement was made for the continuance of the weekly payment until May, when he was again examined by the doctors for both parties, and they both advised him to submit to an operation for removing the detached piece of bone; but this he refused to do. The matter came before the County Court Judge, when all the medical witnesses were of opinion that the man ought, in his own interest, to undergo the operation. The Judge held that the operation was of a simple character, involving practically no risk, the man being thirty-five years of age, and apparently in good health. He also found that it was doubtful if the man's toe would ever get right without an operation, but stating that he felt bound by the decision in the case of Rothwell *v.* Davies (p. 540), made an award in favour of the man for a continuance of the weekly payments. His Honour, however, stated that but for this decision he should have followed his own view of the law, which was supported by a Scottish case, and should have found for the employers.

When the case came before the Court of Appeal upon the appeal of the employers, the Master of the Rolls stated that the case gave the Court an opportunity of setting right a certain misapprehension as to what was decided in the case of Rothwell *v.* Davies (p. 540). His Lordship pointed out that in that case the County Court Judge had found the workman had acted reasonably in refusing to undergo the operation, and he could not take that case as lending any support whatever to the suggestion that a man may decline to submit to a trivial operation not involving any serious risk, but of such a nature that any reasonable man, in his own interest, would undergo it. His Lordship also stated that a continuance of the man's disability would be due not to the original accident, but to his unreasonable conduct in refusing to undergo the operation, and that the employers were entitled to succeed, and reversed the decision of the County Court Judge.

Lord Justice Fletcher Moulton said: "In my view, a workman must behave reasonably, and if the incapacity or the continuance of the incapacity after a certain time is due to the fact that he has not behaved reasonably, then the continuance of the incapacity is not a consequence of the accident, but a consequence of his own unreasonableness. To hold the contrary would lead to this result: that a workman who had an injury, however small, might refuse to allow it to be dressed, and let a trivial wound become a sloughing sore, and lead to partial or total incapacity, for which the employer must compensate him. That is not the meaning of the Act. You cannot draw a line between 'dressing' and 'operation.' . . . The distinction is between being reasonable and not being reasonable."

Lord Justice Farwell agreed with the views expressed by the other Lords Justices, and quoted part of the judgment of Lord McLaren in a case before the Scottish Courts (Dennelly *v.* William Baird and Co., Ltd.), in which his Lordship, in dealing with a case where the operation was not attended with risk to health or unusual suffering, said: "If the sufferer, either from defect of moral courage or because be might be content with his defect, refuses to be operated upon, I should have no difficulty in holding that his continued disability to work at his trade was the result of his refusal to submit to remedial treatment, and, therefore, he is not entitled to further compensation." Lord Justice Farwell said this expressed his own view so entirely that he desired to adopt it (Warncken *v.* Richard Moreland and Son, Ltd., 1909, 1 K.B., 184).

The deduction to be drawn from the next case is that if the workman has acted reasonably in the steps taken in consequence of the accident, and those steps result in death, the employers are liable.

In October, 1908, a workman employed in a calico-printing works received injury to his hand whilst attending to a machine in the course of his employment. He received medical attention at an infirmary, and it was stated that in the usual course the hand would

have to be amputated; but the infirmary surgeon proposed to perform the operation of grafting skin upon the hand so as to preserve the hand intact. The first stage of the operation was performed under chloroform, and was successful. In the December following the accident, the workman was placed under chloroform with a view to completing the operation, but died while under the anæsthetic. The effect of the medical evidence was that the second stage of the operation was not dangerous, though painful; that the administration of an anæsthetic for the purpose was reasonable; and that there was no ground for apprehending death as a result. The County Court Judge found that the operation was not a usual one, but was a bold experiment; that the cause of death was not the accident, but the effect of the anæsthetic, and held that the employers were not liable. The dependants of the workman appealed, and the Master of the Rolls in delivering judgment reversing the decision of the County Court Judge, said that the true test was whether the step taken to obviate the consequences of the accident, and to make the man a sound, able-bodied man, was a reasonable step to take, and in his opinion the course pursued by the workman was not only courageous but reasonable in the interest of the employers (Shirt *v.* Calico Printers' Association, Ltd., 1909, 2 K.B., 51).

The following case makes it clear that in law the question to be determined is whether the workman has acted reasonably under the circumstances in refusing to undergo an operation, having regard to the advice given to him, and not merely whether the operation was one that he might wisely have undergone.

In November, 1908, a seaman, who was fifty-one years of age, was injured whilst at sea in a gale of wind and sustained a double rupture. About three weeks later, on arrival in England, he was advised by one of the visiting surgeons of the hospital to undergo an operation. Soon after this the employers suggested that he should submit to an operation; the seaman's medical attendant advised him not to submit to the operation, and he therefore declined. The seaman applied to the County Court Judge for an award of compensation, but the employers denied liability beyond the period when the seaman would have recovered if he had undergone the operation.

Evidence was given before the County Court Judge by an anæsthetist, who advised the man not to undergo the operation. One of the doctors said the man was suffering from Bright's disease, and thought it would be dangerous for him to undergo an operation without an anæsthetic, and that with kidney disease the administration of a general anæsthetic would entail a risk to his life; and, moreover, there was a slight enlargement of the heart. The visiting surgeon of the hospital stated that, in his opinion, it would not have been unwise for the man to have been operated upon; that the use of a general anæsthetic would have been a risk, but not a great one;

and, if local anæsthetics were used, there would be no appreciable pain and no appreciable risk to life, and another doctor supported this view. The County Court Judge considered the case fell within the decision of Warncken *v.* R. Moreland and Son, Ltd. (p. 542), and that the workman had acted unreasonably in not undergoing the operation, and declined to allow compensation after February 25, 1909. The workman appealed against this decision, and on the case coming before the Court of Appeal the Master of the Rolls said that the test was clearly laid down in the case of Warncken *v.* R. Moreland and Son, Ltd. (p. 542), and, he thought, indicated, although not quite so clearly, in Rothwell *v.* Davies (p. 540); namely, that there was no power to compel a man to undergo an operation; on the other hand, he must act reasonably. His Lordship drew a distinction between this and Warncken's case, inasmuch as in the present instance there was evidence that the man had not acted unreasonably, having regard to the advice he had received; whilst in Warncken's case it was otherwise, his own doctor having advised him to undergo the operation. Lord Justice Fletcher Moulton and Lord Justice Farwell concurred in the views expressed by the Master of the Rolls, Lord Justice Farwell being of opinion that the real question underlying these cases is whether the continuance of the incapacity is due to the original accident, or due to the workman's unreasonable refusal to take a step which any reasonable man would take. The appeal was therefore allowed (Tutton *v.* Owners of s.s. *Majestic*, 1909, 2 K.B., 54).

The next case is important from the fact that the Court of Appeal reaffirmed its previous decisions to the effect that it is unreasonable, in certain circumstances, for a man to refuse to undergo an operation which does not involve much risk.

In 1909 a workman who had met with an accident in the course of his employment refused to undergo an operation, which the employers considered essential, and the County Court Judge held that as the operation was not a dangerous or difficult one, and as the workman's own doctor had advised him to undergo it, in his own interest, it was unreasonable for the man to refuse. The workman appealed to the Court of Appeal, and, in the course of the proceedings, the Master of the Rolls referred to the decisions in Tutton *v.* Owners of s.s. *Majestic* (see above), and Warncken *v.* R. Moreland and Son., Ltd. (p. 542), and stated that the law applicable to cases of this kind was settled by those two decisions, and, having regard to the facts and circumstances in this instance, if ever there was a case in which a man acted unreasonably, it was this case. The other Lords Justices concurred, and the appeal was dismissed (Paddington Borough Council *v.* Stack, 2 B.W.C.C., 402).

Finally, the following case establishes as law that a workman must submit to a reasonable operation if the employers

can satisfy the Court that the operation is *likely* to be successful, as it would be impossible in some instances to produce evidence to the effect that the operation *must* (in point of fact) prove successful ; but that the onus is upon the employers to satisfy the Court that the operation is advisable in the interests of the workman, and also that the workman's incapacity is due, not to the accident, but to refusal to undergo a reasonable operation.

A ship's fireman burnt some of the fingers of his right hand. A few days after the injury one of the blisters burst, and septic matter entered. The wound was dressed and probed several times by the ship's doctor, but the man refused to undergo any more incisions. The doctor suggested an anæsthetic, and warned him that, if he did not submit to the operation, he might lose his finger and perhaps his arm.

When the ship reached port, the man went into a hospital and had his finger amputated. The ship's doctor, in giving evidence, stated that the man could have resumed work in ten days if he had submitted to the operation, and that his cure would have been permanent; but the workman's doctor stated that, in his opinion, further lancing or cutting at the time it was suggested would not have saved the finger. The County Court Judge held that the workman had acted unreasonably in not submitting to the small operation, but he was not able, on the evidence, to determine whether the suggested operation would have saved the finger, and he therefore found in favour of the workman.

The employers appealed to the Court of Appeal, who held that the onus was upon the employers to show that incapacity was not due to the injury, but due to the workman's unreasonable refusal to submit to the operation; further, they held that the employers had failed to show that the suggested operation would have resulted in a permanent cure, and therefore they upheld the decision of the County Court Judge.

The cases of Warncken *v.* Richard Moreland and Son, Ltd. (p. 542) and Tutton *v.* Owners of s.s. *Majestic* (p. 544) were referred to by their Lordships in giving judgment, and they said that they were not departing from the principles laid down in those cases, nor from anything they had there said; but in this case it was impossible for the Court to say that the County Court Judge was wrong in holding that the onus of proof of the employers' contention was upon them, and that they had not discharged it; but if the employers could have shown that the man's condition was not due to the loss of his finger, but was due to the unreasonableness of the workman in refusing to undergo the operation, it having been found that the refusal was unreasonable, then the employers would have succeeded (Marshall *v.* Orient Steam Navigation Company, Ltd., 1910, 1 K.B., 79, and 3 B.W.C.C., 15).

CHAPTER XXXVII

MEDICAL ASPECT OF THE WORKMEN'S COMPENSATION ACT, 1906 (*Continued*)

IV. Cases decided upon Application to Revise or Terminate Weekly Payments.

NUMEROUS cases have come before the Courts in respect of the employer's right to have the weekly payment ended or diminished, and through applications by workmen to have the weekly payments increased, and it may be useful to consider some of those falling into the first category, so far as they have reference to malingering or suspected malingering.

As the question whether the circumstances are such as to justify a review of the weekly payment is one of fact for the County Court Judge to decide, most of the cases upon this point are disposed of without reaching the Court of Appeal, and are rarely reported. I purpose setting out in some detail a few of the exceptional cases upon this subject which have come before the Court of Appeal.

Every form of injury is liable to be followed by secondary effects upon the nervous system. By many it is thought that the nervous effects of injury show themselves mostly in the more cultured classes, and that the stolid, less receptive nervous system of manual labourers is not so likely to be affected by the after-effects of injury. My experience is that such is not the case, and that labourers do, as a matter of fact, suffer, and often suffer severely mentally, from the after-effects of injuries. Again and again instances have come under my notice where injuries have been received in some catastrophe which has received much publicity, and when those injured seem to have been profoundly influenced on the sensitive and emotional side of their characters. The condition is an un-

mistakable and definite entity, and one feels that it is dependent to a very large extent, if not entirely, upon introspection, love of notoriety and sympathy, combined with lack of courage.

After-Effects of Injury in Relation to Capacity for Work.—The law of this country is, that although a workman may have recovered from the physical injury caused by the accident, the after-effects of it must not be disregarded in considering the man's capacity for work.

A collier, who had sustained an injury to his leg, had been paid a weekly sum for a considerable time after the accident, and the employers, considering the time had arrived for a review of the weekly payment, applied to the County Court Judge.

Evidence was given before the Judge that the muscular injury to the man's leg caused by the accident had come to an end, and that he was restored to his condition before the accident so far as muscular power was concerned, but that he was suffering from traumatic neurasthenia, the result of the accident. The Judge thought the workman was able to work, as, according to the medical evidence, the loss of sensation from which he was suffering did not affect his capacity for work; and, although the workman thought he was incapacitated because he mistakenly and unreasonably believed that he could not work, the Judge found that he was not totally incapacitated for work, and reduced the weekly payment to a penny a week. The workman appealed to the Court of Appeal.

The Master of the Rolls, after referring to the evidence, said he accepted the County Court Judge's findings of fact, and stated that His Honour had found that the workman was not malingering, and that he was not shirking the work with any desire or intention of avoiding it, but that it was sufficient for the employers to show that the muscular mischief was at an end. His Lordship was, however, entirely unable to assent to that view, and it seemed to him an entire fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, while the nervous or hysterical effects still remain. His Lordship referred to certain specific findings of the County Court Judge, and stated that the result of those findings was that the workman was still suffering from the accident, in that he had not wholly recovered from the nervous effects, which were just as real and just as important, and made him unable to work; but he hoped that nothing he said would ever be supposed to give any countenance to malingering. If the County Court Judge had found that the man was malingering, the position would, of course, have been entirely the other way, and that would have been a question of fact for him, and the Court would not have interfered with the finding. In the circumstances, the decision of the County Court Judge was reversed, and the appeal allowed.

Lord Justice Fletcher Moulton said that, so long as the nervous

consequences remained, the man was entitled to compensation just as much as if his muscular power had not recovered.

Lord Justice Farwell remarked that the fallacy which appeared to underlie the County Court Judge's decision was that he had disregarded the nervous affection (Eaves *v.* Blaenclydach Colliery Company, Ltd., 1909, 2 K.B., 73, and 1 B.W.C.C., 329).

Nervous Shock apart from Physical Injury.—The Court of Appeal has now held that nervous shock may be brought within the term " accident " without actual physical injury.

A collier went to the assistance of a fellow-workman who, having been badly injured, was bleeding from the head, face, ears, and eyes. He picked him up and carried him away, but the injured man died a few minutes later.

It was alleged that the man sustained such a severe nervous shock that he became neurasthenic and unable to resume work. The County Court Judge found that his incapacity was genuine, and that it was caused by what he had seen and done in the course of his employment.

Upon Appeal to the Court of Appeal, the County Court Judge's decision was upheld on the ground that the neurasthenia was due to personal injury by accident arising out of and in the course of the employment.

The Master of the Rolls said that the nervous shock produced a " physiological " effect, although there was no abrasion, cut or wound visible to the eye, and he saw no difference in principle between a man going about his work and being injured by a fall and the facts in this case (Yates *v.* South Kirby, Featherstone and Hemsworth Collieries, Ltd., 3 B.W.C.C., 418).

County Court Judge's Finding as to Malingering practically Final.—The question whether a man is or is not malingering is one which is practically always finally decided by the arbitrator or County Court Judge, the only possible variation of this being, that if the Court of Appeal consider that the evidence upon which the County Court Judge formed his opinion did not justify his finding, the Court of Appeal may reverse it. But the higher Courts, not unnaturally, decline to interfere with decisions upon questions of fact which have been investigated by a Judge who has seen the witnesses, observed their demeanour, and formed a deliberate opinion upon the facts as stated before him at the trial.

A workman, who was injured in a colliery in 1903, was paid £1 a week for some four years, when light work was given to him, but he stated he could not perform it, and that he suffered pain. The matter came before the County Court Judge on an application to

review the weekly payment. Evidence was given on behalf of the employers that the man could follow light employment, but the workman's doctor said the man was still suffering from the effects of the accident; the man might suffer from hysteria, but if so, and if there were imaginary pains, those pains would be felt as acutely as if they were real. His Honour held that the hysteria was exaggerated intentionally, that the man could perform light work, but had never made a genuine attempt to do so. He decided in favour of the employers, but expressed the hope that there would be an appeal in order that there might be some guidance in such cases, which were becoming frequent. The workman appealed to the Court of Appeal, and the Master of the Rolls made reference to part of the evidence which went to show that if the man had been compelled to work he would have recovered.

Lord Justice Farwell pointed out that the evidence showed that if the man had stuck to his work he would have recovered, but he gave up as soon as his heart failed him, and it was held by all three Lords Justices that there was ample evidence to justify the County Court Judge in his ruling (Price *v.* Burnyeat, Brown and Co., 2 B.W.C.C., 337).

Employers not Liable for Results of Unreasonable Introspection after Recovery.—Although a workman may have recovered from the physical effects of his accident, nervous affections naturally and directly arising from the accident itself must not be disregarded in deciding whether or not the workman is incapacitated: on the other hand, employers are not liable to pay compensation for nerve trouble brought on by worrying or brooding over the accident, or fear of returning to work because of possible consequences, if, in the case of a reasonable person, such worry or fear would be unjustifiable.

It seems almost unnecessary to say that it is the duty of a workman who has received an injury, and has recovered from its physical effects, to use his best endeavours to make himself fit for work. In actual experience it is found that in many of the cases the crucial point to be considered is not whether, for instance, certain fractures have united or certain wounds have healed, but, is the workman fit for duty? Too often the original injury has been wholly recovered from for weeks, months, or even years, but the injured man has allowed the idea of his injury to obsess him, and has given way to a nervousness which a reasonable man would overcome, and so has indefinitely postponed that return to work which would have enabled him to forget the accident.

In November, 1907, a female relief-stamper met with an accident in the course of, and arising out of, her employment, whereby she lost the terminal phalanx of the middle finger and half the terminal phalanx of the ring finger of the right hand. She had been paid half-wages for many months, when her employers applied to the Judge at the City of London Court to terminate the weekly payments on the ground that she was quite fit physically to resume her former work. They were willing, in the event of her returning to work, to pay her the full wages she had been receiving, or as much more as she could earn at her work. Two doctors gave evidence that the injured woman could do her work quite well. Judge Rentoul said it was of the very greatest importance that it should be decided, once and for all, whether a workman or workwoman physically fit, but feeling nervous at working the same class of machine, and therefore refusing to try it, should be considered unfit within the scope of the Act, and whether such a person could be compelled to go back to work or the compensation cease. He said he must hold that the compensation must cease, as the whole of the medical evidence showed the girl to be fit for her work in all respects, except in regard to timidity produced by the accident. It was possible that all her life she would shy at using the machine. Was she, then, to go on receiving compensation for ever? The longer she kept off trying, the worse it would be. A doctor, called for the workwoman, thought she might try to work; and the Judge directed that the payments be reduced to 1d. a week. He thought it was "strong" conduct on the girl's part that she had not tried to work. He gave the employers the costs of the application (Pearson *v.* Pimms and Sons, Ltd., 126 L.T., 301).

This case was not taken to the Court of Appeal.

Court of Appeal upholds Employer is not Liable for Man who only thinks himself Ill.—In the following important case the County Court Judge stated quite clearly that, in his opinion, the workman was "a typical neurasthenic case from a legal point of view," and hinted that he would be very glad if the case were taken to the Court of Appeal, so that it could be finally decided whether an employer must continue to pay weekly wages to a man who only *thinks* himself unfit for work. As will be seen, the Master of the Rolls, in the Court of Appeal, upheld the decision of the County Court Judge.

A workman met with an accident under circumstances which brought it within the terms of the Act of 1906. The accident was not of a very serious character, and after a while the man went back to work for a short time, but appeared to be unable to do full work. After a stay at a convalescent home, he again returned to his employment, and continued at it for eighteen months, earning full wages. He left work again, and applied for weekly compensation.

At this period work was slack, and the man would have earned no more by following his employment than he would get from the weekly payments under the Act. The County Court Judge expressed the opinion that the workman was practically playing at work, that it was no use to him, and he was no use at the works ; also that his action was influenced by the slackness of work, and that the effect on the funds of the man's trade union was also a factor in the case, the idea being to relieve the union by claiming under the Act ; and he found that the refusal to continue work was due to nervousness, which an average reasonable man could overcome. His Honour was of opinion that, if the man had been a wealthy man, and desired to get back to hunt or shoot, he would have done it. He said : " This is a typical neurasthenic case from a legal point of view, and I have to give my decision upon it. If the law be that the average reasonable man is allowed to stay away from work on account of nervousness, this case will be upset, and this very person, who fancies himself unable to work, will continue to draw a pension from the rest of the community, who will have to pay. I do not think this is the meaning of the Workmen's Compensation Act." His Honour declined to allow compensation, and the workman appealed against this decision.

The Master of the Rolls, having referred to the findings of the County Court Judge, said he did not wish to use the word " malingering " if he could find another word to express what he meant, but he thought the County Court Judge meant that the workman had left his work under circumstances which threw suspicion on his conduct, and it was impossible, upon those findings, to interfere with his decision, and there was no doubt that the result of payment of compensation took away all stimulus for work. Both the other Lords Justices concurred, and the appeal was dismissed (Turner *v.* Brooks and Doxey, Ltd., 3 B.W.C.C., 22).

A blacksmith's striker sustained injury by accident to his back and legs under circumstances which entitled him to compensation under the Workmen's Compensation Act. After the physical injuries had subsided, he suffered from a functional paraplegia. When the case came before the arbitrator two and a half years after the accident, during which time the man had been in receipt of half-wages, medical evidence was given on behalf of the employers that, if the man made a sufficient effort of will, he would be able to work and would gradually recover. There was no allegation that he was malingering. The case was heard with a medical assessor. After consulting with the medical assessor, the arbitrator came to the conclusion that if the man made up his mind to do some work he would be able to do it, although not perhaps immediately, and as an " incentive " to induce him to try he reduced the weekly payment from 13s. to 10s.

Nine months after this, the man not having commenced work, the employers made another application to the arbitrator to further reduce the weekly payment, on the ground that he was not suffering from the effects of the accident, and his present condition was due

to his neglect of physical and mental effort. The workman contended that the weekly payment should be increased to 13s.

The arbitrator found that the man was able to do light work of some kind, and found as a fact that his failure to do any work had been brought about solely by his wilful and intentional neglect to get suitable work, and reduced the weekly payment to 1d.

Upon appeal, the Court of Appeal allowed the appeal. The Master of the Rolls stated "it was important to remember that no one says that he is a malingerer. The learned County Court Judge appears to have overlooked the fact that the loss of will-power is just as much a result of the accident as any objective symptoms would be. . . . He is not a malingerer, but an honest man suffering from loss of will-power, due to the accident."

Warrington, L.J., remarked: "There is, on the whole, in my opinion no ground for saying that the man has acted unreasonably, and has therefore prevented or postponed his recovery" (Southampton Gas Light and Coke Company *v.* Stride, 9 B.W.C.C., 555).

It is somewhat difficult to reconcile this decision with some of the former cases, but the Court of Appeal evidently considered that the evidence went to show that the loss of will-power *was* due to the accident, and not as the arbitrator had regarded it—viz., as due to the man's wilful and intentional neglect.

The view taken in the above case may perhaps be best understood from the following case:

A workman was injured by an accident arising out of, and in the course of, his employment. Compensation was paid to him under the Act for three years, when the employers ceased payment on the ground that the man had recovered from the effects of his injuries. The case came before the Sheriff-Substitute (the arbitrator) upon proceedings to record an agreement, alleging that the employers had agreed to pay half-wages. The question of the man's condition was referred to a medical referee, who reported that the man had recovered from the direct effects of the injury to his body, but not from the indirect. The injury had thrown the man out of work for a time. His age, sixty-three, coupled with his disposition to obesity, had told against him, so that he had become less and less fit for work.

The arbitrator found that the injuries resulting from the accident had ceased. The workman appealed to the Court of Session. It was contended on behalf of the employer that (1) the obesity did not result from the injury, (2) the injury did not cause the obesity.

The Court of Session held that the arbitrator had come to a wrong conclusion, whereupon the employers appealed to the House of Lords, which reversed the judgment of the Court of Session and upheld the arbitrator's decision.

Lord Loreburn stated that the House could not go into the evidence

given before the arbitrator and decide whether or not the House would have come to the same conclusion, but their Lordships had only to say whether there was evidence upon which a reasonable man could arrive at the conclusion he came to, and therefore his decision could not be interfered with (George Taylor and Co. *v.* Clark, 7 B.W.C.C., 871).

It will be seen from the first of these cases that the arbitrator decided that loss of will-power to work was due to the accident, therefore the man was entitled to compensation; whilst in the other case, the man's obesity not being due to the accident, no compensation was payable. It therefore resolves itself entirely into a question of fact for the arbitrator to determine, upon the evidence before him, whether or not the incapacity is due to the accident; and although at first sight the decisions may appear to be inconsistent, when carefully examined they are not really so.

Self-induced Mental Condition not Due to Accident.—As has already been stated, it is not unusual for the memory of an accident so to linger as to alter the mental outlook, and prolong the incapacity, of a man who at one time has been genuinely injured. In the following case the County Court Judge held that physically the workman had recovered from the accident, but he had fostered a mental condition, the effect of which was that he would not work, and that the mental condition could not reasonably be held to be the result of the accident itself.

An application was made by the employers to the deputy County Court Judge for a review of the weekly payment to a workman, aged thirty-nine, who had received injury in the course of his employment in May, 1905. The original injuries had been to the back, several ribs, and the right kidney. In December, 1908, the parties consented to the case being referred to one of the medical referees, who certified that at the time of the examination the workman was only suffering from stiffness of the muscles of his back, due to long disuse, which made him afraid to use them, and that he was fit for his ordinary work, especially if he resumed it in a gradual and easy manner. Upon this report the County Court Judge reduced the weekly payment to 1d. The man returned to work for short spells, but finally gave up in February, 1909, owing, as he stated, to the pains in his back.

The matter again came before the deputy Judge for a review on an application by the workman in June, 1909, and, after hearing the medical evidence on both sides, the deputy County Court Judge thought the case should be reported upon by both medical referees of

the Court. These gentlemen were supplied with copies of the medical evidence, and the workman was examined by them. The one who had examined the man before reported that he saw no reason to alter the opinion he had formed in December, 1908, and that the man had worried and brooded so much over his accident that he had worked himself up to such a state that he anticipated failure. The other medical referee reported that he was of the most definite opinion that the man had thoroughly recovered from the effects of the accident, and that physically he was quite able to follow his usual work if he chose to do so, and he could only surmise that his mind would not allow him to summon up courage to persevere with his work.

His Honour, after referring to the reports of the medical referees, stated that it was perfectly plain that physically the man had quite recovered from the accident, and *that he could not hold that his mental condition was the result of the accident*, and he considered that his refusal to interfere with the order reducing the weekly payment to 1d. would be a greater incentive to the man to get himself fit for work than a sea voyage or the advice of a brain specialist, as was suggested by his counsel. The workman appealed against this decision, and the Master of the Rolls stated that he agreed with the very full and adequate judgment of the County Court Judge, and the other Lords Justices having agreed, the appeal was dismissed (Holt *v.* Yates and Thom, 3 B.W.C.C., 75).

Presence of Pre-existing Disease.—The possibility of an injured workman having, in addition to his accident, serious pre-existing internal disease is one which a medical examiner should always keep before him. A number of cases have from time to time come before the Courts in which these points have been considered. Recent cases on the subject are given below, and, as the judgments are of the greatest importance, they are set out at some length.

It will be noted that in the following case the Judge remarked that he was satisfied the woman was not malingering, and that her apparent incapacity was due, as I had ventured to suggest when giving evidence, to her nervous mental condition. He stated that he believed the accident was not *per se* the cause of her disability, but that some other nervous influences were at work.

This view was justified by the subsequent history, for, long after the trial was over, I obtained definite information from the doctor on the other side that the applicant was at the time of the trial, unknown to everyone, suffering from advanced malignant disease of the breast, and that soon after the trial she underwent a serious operation, from which she

speedily recovered, and at once resumed her old work—that of a charwoman.

Towards the end of 1909 a question came before the Judge of the Southend County Court for decision in regard to the conduct of a person who had received an injury which brought the case within the Act. The injured person was a charwoman, and the injury, which was sustained in 1907, was caused by a needle penetrating the palm of her hand. It became embedded between the shafts of the third and fourth metacarpal bones of the right hand. She was advised by a doctor on the day of the accident that it would be dangerous to attempt to remove the needle, as it would involve opening the palm of the hand, and there was a possibility of inflammation being set up, but that the needle would cause her no trouble—indeed, it might work itself out or get near to the surface, so that it could be easily extracted. She became so nervous and worried in consequence of having the needle in her hand that she was advised to have an operation performed, which was done in November, 1908, but without success, and the needle remained in her hand. All the medical witnesses called at the hearing were agreed, in view of an X-ray photograph which had been taken, that the condition of the woman's hand could not be attributed to the original penetration of the needle into the hand or its presence there since, and if no operation had been performed she would have been fit to work shortly after the happening of the accident. The question to be decided, therefore, was whether the operation had produced the woman's present condition. After reviewing the medical evidence, His Honour stated that he was satisfied the woman was not malingering, and that her apparent incapacity to use the hand arose from *her nervous mental condition*, which induced in her a firm belief that she could not use her hand owing to the continued presence of the needle. She was suffering from what His Honour described as "false neurasthenia," and he said if the woman had acted reasonably her hand would have been available for work soon after the accident, and therefore the absence of reasonable conduct and care had broken the chain of causation, and that the principles laid down by the Court of Appeal in the cases of Warncken *v.* R. Moreland and Son, Ltd. (p. 542), Tutton *v.* Owners of s.s. *Majestic* (p. 544), and Marshall *v.* Orient Steam Navigation Company (p. 545), applied to the case. His Honour also said: "I think that in judging what is reasonable conduct I must apply the ordinary test—namely, in this particular case, what would an ordinarily prudent and reasonably minded person have done? The applicant omits to do what a reasonably minded and prudent person would have done. I think she was unreasonable in her conduct in not having exercised or worked her hand in a reasonable manner, which would have prevented the condition of things which now exist." The Judge's award was therefore in favour of the employer (Steele *v.* Bilham, 128 L.T., 416).

In October, 1909, a collier was injured by a fall of coal in the course of his employment, causing a permanent lesion of the right knee and

injury to two of his ribs. Compensation was paid up to February, 1910, when light work was given to him by his employers and he was paid his former rate of wages. He again injured his right knee whilst in the service of the same employers in October, 1911, and full compensation was paid up to May 24, 1912, at which date it was discovered that he was suffering from heart disease and payment of compensation was stopped. In June, 1912, the workman instituted proceedings under the Act, when the County Court Judge found that he was incapacitated from the condition of the knee which was due to the accident, and also that he was equally incapacitated from heart disease which was in no way connected with the accident. In his judgment he stated:

" If there had been no accident at all, he would still be incapable for work as a miner or banksman, and I am of opinion that there is no work that the accident prevented him from doing which the heart disease has not also prevented him from doing."

Accordingly he made his award in favour of the employers.

Upon the case coming before the Court of Appeal, the Court decided that the decision of the County Court Judge was wrong, and that the workman was entitled to compensation.

Cozens-Hardy, M.R.: " This appeal raises an extremely important point. . . . The date of the application is the critical date. But when the man has not completely recovered, has not been cured, I think it is not necessary for him to establish that his present incapacity is due *solely* to the accident. . . .

" Except in the case of an infant, a man who is totally incapacitated by an accident can, under the statute, get only half his average weekly earnings for a period prior to the accident. In an action for negligence against the employer, the man would recover a lump sum by way of damages, based, according to a proper direction from the Judge, upon the actual wages lost and the possibilities of the future, together with something by way of solatium for personal sufferings. There is nothing of the kind to be found in the statute. I have read Lord Justice Hamilton's judgment, with which I entirely agree, and I do not think I can usefully add anything to what he has said on this point.

" There are, I think, indications in the statute which tend to confirm the view I have indicated. Schedule I. (17) provides for redemption of a weekly payment at the option of the employer. If the incapacity is permanent, the amount is the purchase-money of a Government life annuity, subject to a discount of 25 per cent. The possibility of a supervening infirmity varying the rights is not hinted at. . . ."

Buckley, L.J.: " . . . . Suppose, then, that a man who has lost his two fingers, having proved that he cannot earn the same wages as before, has been placed by agreement, or by the order of the Court, in receipt of a certain weekly payment, and that when the employer comes to review he proves that the man has now, by something for which the employer is in no way responsible, totally lost his sight or

lost the whole of the left arm, so that, whether the injury by accident to his two fingers had happened or not, he would have been incapable of earning wages by reason of his total loss of eyesight or total loss of the arm. Or suppose (which is the present case) that the employer, having paid compensation down to the date of the total loss of eyesight or loss of the arm, has thereupon discontinued the payment, and that the man comes and seeks to establish that he is, by the accident which lost him his fingers, still incapacitated from earning wages notwithstanding the altered circumstances. How does the matter then stand? Upon those hypotheses the employer, upon the application to review, or the man upon the application for an order for payment, has to deal with a state of facts in which it may be said that there is no incapacity for work resulting from the injury in his employment, for (whether that injury has been sustained or not) there would have been incapacity for work by reason of something else; that there is no continuing consequence resulting from the accident, for if there had been no accident at all the man's incapacity would be the same. This course of reasoning leads to the conclusion that there is no continuing inability to earn wages attributable to the first accident. It is suggested that this is not so, because the Act does not contain the word 'solely' in the connection 'personal injury by accident arising (solely) out of,' etc., and is not to be read as if it were there contained. This is certainly true. . . . Suppose the man, before sustaining any injury, was earning 28s. a week, and that he suffers (in his employment with employer A) a first injury which reduces his earning capacity to 21s. and suppose that he then suffers (in his employment with employer B) an injury which produces total incapacity, and would still produce total incapacity even if the first injury had not been sustained. At the date of the first accident he was a 28s. man reduced by injury to 21s. At the date of the second accident he was a 21s. man reduced by injury to total incapacity. For the second injury he will be compensated on that latter footing. His compensation for the first injury, by which he was reduced from a 28s. man to a 21s. man, ought to continue also. In other words, his first employer cannot say that the man was so injured by the second accident that, if there had been no first accident, he would still be totally incapacitated, and therefore he is no longer suffering inability to earn wages by reason of the first accident. The same result ought to ensue if the second injury were not in his employment. This view of the matter shows that, although there is in a sense no continuing inability to earn wages due to the first accident after the second and greater injury, yet there is a continuing depreciation of the wage-earner which produces its effect when he is affected by the second accident. . . .

"But if the sounder argument be, as I think it is, that the consequences of the first injury still continue, because it resulted in his standing at the date of the second injury in such a position that that second injury did him less pecuniary damage than it would otherwise have occasioned, then the appeal must fail. This, I think,

is right. In a sentence, my conclusion is, that while the compensation is only for the continuing consequences of the injury measured by diminished capacity to earn wages, still, a subsequent cause leaves the consequence of that diminished capacity still existent, and only adds a further diminished capacity. I think, therefore, that the appeal must be allowed."

Hamilton, L.J.: "This case raises a point of first impression and of small compass, but of great importance. . . . He proved that partial incapacity for work—namely, his ordinary work as a miner—had resulted, and was then still resulting, from the injury—namely, a permanent injury to his knee, which restricted its movements and prevented him from doing his former work. If the case had stopped here, he would have shown that he was entitled to be paid by his employer 'compensation' by way of weekly payments, 'during the incapacity.' The employer, however, elicited and proved, as he was entitled to do, that by reason of infirmity, supervening since, and independently of the accident—namely, a defective condition of the mitral and aortic valves of the heart—the workman was equally incapacitated for work, which incapacity resulted, not from the accident, but from his infirmity. In the learned Judge's words, 'he is incapacitated by both causes, each independent of the other, each operative if the other did not exist. . . . He was rendered incapable of doing any but light work owing to the accident, and he is also incapable of doing any but light work in consequence of the heart disease. There is no work that the accident prevented him from doing which the heart disease has not also prevented him from doing. . . . In my opinion, the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart. It cannot be said of him that partial incapacity for work has not resulted, and is not still resulting, from the injury. All that can be said is that such partial incapacity is not still resulting *solely* from the injury. To read the word 'solely' into the Act after the word 'injury' is not interpretation, but is legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the legislature so intended. . . .

"The period of continuance of the weekly payment is during 'the incapacity'—that is, the incapacity resulting from the injuries—and no reference is made to the possible supervention of other causes of incapacity. The object of the Act is to give an injured workman a livelihood, so long as an injury incapacitates him from gaining his living. That the employer provides the compensation, and not the Exchequer, is for this purpose immaterial. The Act is a guarantee of workmen against the risks of accident. It is not founded on indemnity, and the ideas of restitution for wrong-doing and of *restitutio in integrum* are foreign to it. I am therefore of opinion that there is nothing in the scheme or language of the Act which invalidates the construction above expressed" (Harwood *v.* Wyken Colliery Company, Ltd., 1913, K.B.D., 158, and 6 B.W.C.C., 225).

Postponement of Return to Work after Recovery. — How long a workman who has undoubtedly been injured may postpone his return to work after he has recovered from his original injury is always an interesting question. Muscles accustomed to regular, steady exercise soon get out of condition, and this loss of condition frequently conduces to a postponement of the return to work. It was pointed out by the Judge in the case about to be quoted, that the Workmen's Compensation Act is intended to compensate for loss of wages, so far as that loss is *due to accident*. It is obviously not fair to compel an employer to pay weekly allowances after a workman has recovered from his original injury merely because his muscles have been allowed to become what a member of a football team would describe as being " not in good training." The question whether, in such circumstances, a workman is entitled to any payment, and, if so, how much, is discussed in the following interesting case which came before the Judge of the Colne and Nelson County Court.

> In August, 1911, a workman had been injured; the medical men on both sides admitted it. The effect of their evidence was that the only thing which substantially affected his wage-earning capacity was his want of muscular power, and that this was due, as is usually the case, to his not having made use of his muscles for a considerable time, as he had done before the accident. His Honour, after referring to the medical evidence, stated that he could not look upon the man's capacity to do his old work, or his opportunities for getting his old work, as having been substantially diminished by the accident, and awarded him 4s. a week only. His Honour went on to state as follows: " I have often pointed out in previous cases that the sole object of the Act is to compensate workmen for the loss of wages so far as that loss is due to the accident. If a workman who has been injured has so far recovered that he is able to earn some wages, but makes no effort to earn those wages, his loss of those wages cannot be said to be due to the accident, but is simply due to the workman having made no effort to earn them. If, therefore, as in this case, the workman has chosen not to work, when the evidence shows that, so far as the accident is concerned, he is nearly as fit to work as he was before the accident, I cannot find that the loss of wages is entirely or even mainly due to the accident. A workman can, according to the Act, be compensated for what he is unable to earn, but cannot be compensated for what he declines to earn " (Lidderdale *v.* Robinson, 132 L.T. 12).

Duty of Employee to attempt to obtain Suitable Work.— If a workman is fit to undertake work of any description, it

is his duty to endeavour to obtain it, and the employer is not liable to pay full compensation when a workman is able to work and earn *something*. The following decided case illustrates this point :

> A workman in 1907 had his right femur fractured by an accident ; his right leg was in consequence 1½ inches shorter than the left, and he was permanently lame. In 1908 he was awarded 15s. a week compensation, and in 1911 the employers applied to the County Court Judge to have the weekly payment reduced on the ground that the man was able to do light work. The employers called evidence to support their contention that the workman was able to undertake light work not involving much getting about ; they tendered no evidence that the man had been offered light work, or that it was obtainable, but the man admitted that he had never tried to get light work. The Judge reduced the weekly payment to 10s., against which award the workman appealed.
>
> Counsel for the workman argued that there was no evidence of a change of circumstances to justify the County Court Judge in reducing the weekly payment. The employers' counsel was not called upon. Lord Justice Fletcher Moulton pointed out in the course of the proceedings that the medical evidence was to the effect that the man had so far recovered as to be fit for light work, and in giving judgment the Master of the Rolls said : " I think this is a perfectly clear case. A man meets with an accident, and gets compensation paid him for a time. The employers apply for a review to terminate or diminish the award. Medical evidence is called, including the evidence of the man's own doctor. Shortly, their evidence is that the man has so far recovered that he is now fit to do light work which does not require much getting about. The man says in reply, ' I have never tried to get light work,' and he seems to have taken up the position that he is entitled for the rest of his life to do no work. In these circumstances the Judge has reduced the payments from 15s. to 10s. a week. The ground of the appeal is that there is no evidence on which he could reduce the award to that sum. I think there is evidence on which he could do so." The appeal was therefore dismissed (Anglo-Australian Steam Navigation Company, Ltd., *v.* Richards, 4 B.W.C.C., 247).

The question whether a workman who has received injury arising out of, and in the course of, his employment has or has not recovered from the effects of the accident is also one of fact for the arbitrator or County Court Judge to determine upon the evidence given before him, and, as before stated, findings of *fact* by the arbitrator or County Court Judge will not be interfered with by the Court of Appeal if there is evidence to support them.

The following case is confirmatory of the above statement.

It is one in which some slight physical defect remained as the result of an accident. The County Court Judge, acting as arbitrator, found *as a fact* that the defect existed, *but no longer incapacitated* the workman from working. The case was taken to the Court of Appeal by the workman, and the appeal was dismissed.

In December, 1910, a bricklayer's labourer met with an accident by which his finger was injured, under circumstances which entitled him to the benefits of the Act. The workman received compensation up to April, 1911, when the weekly payment was terminated by the County Court Judge upon the application of the employers, on the ground that his incapacity had ceased. The Judge found that, although the finger was still slightly stiff and bent, there was no likelihood of recurrence of incapacity. The workman appealed against this decision, and his counsel argued that the Judge should have made a suspensory award, and should also have considered the question whether the man was hampered in the labour market. Counsel for the employers were not called upon. All the members of the Court of Appeal agreed that the appeal should be dismissed (Edmondsons, Ltd., *v.* Parker, 5 B.W.C.C., 70).

Employer Liable only for Compensation in respect of Wages that Workman is Unable to Earn.—If the workman's incapacity is due to his unreasonable failure or refusal to undertake work which would be beneficial to his recovery, he is not entitled to compensation, the employer being only liable to pay compensation in respect of wages which the workman is *unable* to earn, and not of wages which he *refuses* to earn.

The following case is condensed from over twenty pages of the law reports. It confirms the view that it is not necessary for an employer to prove, in order to justify him in stopping payment, that a workman who has been injured in his service, and has partially recovered, is able to obtain suitable employment. The employer is not bound to provide him with such work, nor to prove that he can actually obtain it. If the workman has so far recovered as to enable him to undertake work of a suitable kind, it is his business to get it.

In 1904, a workman, who was employed on the tramways of a Corporation, fell from the top of a car and injured his right arm, and compensation was paid to him by the Corporation. He was subsequently employed by them to drive a horse and trap, and in July, 1908, met with a second accident, and received half-wages from the date of that accident until September 24 following;

payment was then stopped. In May, 1909, he applied to the County Court Judge for an award, claiming half-wages from September 24, 1908. At the hearing before the County Court Judge, medical evidence, which was very conflicting, was tendered, and the learned Judge called in the medical referee, who reported that there was considerable loss of power in the man's upper extremities, and many other evidences of serious disease of the nervous system, and it was quite uncertain that those conditions would after a while improve ; that the man was then absolutely unfit to follow his occupation of driving a horse, and all he was fit to do was such work as a watchman's, which would require no muscular power in his arms. An award was made by the Judge in favour of the workman for half-wages from September, 1908. In September, 1910, the employers applied to the County Court Judge to review the award, and by arrangement only one medical witness was called on each side. The doctor who was called for the employers said there was nothing the matter with the man but a slight swelling in the left wrist, which was not sufficient to prevent him doing his work, and the general effect of his evidence was that the workman was a malingerer. On the other hand, the workman's doctor said that the effect of the accident was such that the man was not able to do the work that he had been doing before the accident, and that he was suffering from traumatic neurasthenia. The man himself stated that he could not do his former work, and that he had, without success, made nine applications for work at delivering bills, three or four for employment as a watchman, and one for employment as a postman. The County Court Judge, having regard to the conflicting evidence, again called in the medical referee, and he reported that the man was suffering from impacted dislocation of the bones of the left carpus as a result of the injuries received by him in July, 1908 ; that this condition greatly weakened the grasp of the left hand, and quite incapacitated him from driving a horse and trap in the usual manner ; but the man was then quite able to do any form of light work, more particularly such as would require principally the use of the right hand. The County Court Judge reduced the weekly payments from 9s. 2d. to 8s., stating that he was of opinion that the man had greatly improved since the making of the award, and, taking all the circumstances into consideration, he came to the conclusion that 8s. a week was a proper and sufficient weekly payment to be made to the man in respect of the incapacity from which he was suffering.

The workman appealed. The consideration of the case occupied the Court of Appeal a considerable time, all the Lords Justices delivering judgments. Lords Justices Fletcher Moulton and Buckley agreed in dismissing the appeal, but the Master of the Rolls dissented from the view taken by them.

A few extracts from their Lordships' judgment may be given :

The Master of the Rolls said : "This state of facts raises the question whether an employer, admittedly liable to pay compensa-

tion for an accident which disables the man from following his former occupation, can obtain an order for the termination or reduction of the compensation by merely proving physical ability to do light work without either offering to provide such work or adducing some evidence that light work can be obtained in the neighbourhood where the man resides, and of a suitable character."

"In my opinion, apart from authority, this question should be answered in the negative. The effects of the accident have not been removed, and I cannot think that the workman ought to have his compensation reduced merely on the ground that he is physically able to do a different kind of work, which, in truth, cannot be procured. It is not a case in which the effects of the original injury have completely disappeared so that the man is as capable as ever he was. In that case the employer, who does not guarantee the labour market, is free from all further liability."

Lord Justice Fletcher Moulton said: "The appellant (the workman) put forward an alleged principle of law to the effect that where partial incapacity has been caused by an accident, the employers are bound to show not only that the workman is capable of doing other work, but that he is able to obtain it, and that otherwise he is entitled to an award as for total incapacity. If any such principle of law exists or is deducible from the decisions of this Court, it must have a most important effect on the rights of parties under the Act, and I therefore propose to examine the question from the point of view of principle first, and then to examine the decisions that have been cited in support of it, to determine whether this contention of the appellant can be sustained. . . .

"When the incapacity ceases, the employer is entitled to be relieved of the obligation to make the payment. The diminution of earning-power has ceased, and with it has ceased the right to compensation. In the case of continuing incapacity, it is equally clear that the payments depend on the diminution of earning-power" (Cardiff Corporation *v.* Hall, 1911, 1 K.B., 1009, and 130 L.T., 505).

Service Pension in Relation to Workmen's Compensation Allowance.—The pension which, under the terms of their service, certain workmen become entitled to for injury has often been disregarded when the amount of compensation under the Workmen's Compensation Act is being assessed, and this practice has caused much dissatisfaction among employers.*

When considering this matter, it is necessary to remember the provisions of the Act in relation to compensation payable in case of injury. Schedule I. (3) provides as follows:

* This has a very direct bearing upon malingering and exaggerated sick claims, and I propose to discuss the question very briefly.

> "In fixing the amount of the weekly payment, regard shall be had to any payment allowance or benefit which the workman may receive from the employer during the period of his incapacity. . . ."

The method prescribed by the Act for ascertaining the amount of compensation or varying a weekly payment in case of disagreement is by arbitration; but if the amount is agreed between the parties—when the workman has not returned to work, or is not earning the same wages as he did before the accident—a memorandum thereof has to be sent to the Registrar of the County Court to be recorded in accordance with rules made under the Act. Where it appears to the Registrar that an agreement for redemption of a weekly payment, and in certain cases for fixing the weekly payment, ought not to be recorded or registered because of the inadequacy of the amount, he may refuse to record it, and the matter is then referred to the Judge of the County Court, who may make such order as in the circumstances he thinks just. It frequently happens that a workman is entitled, after a certain number of years' service, to a pension, the sum, as a rule, being larger as the years of service increase. In some instances a pension is not payable until the person entitled to it reaches a certain age, but in others it becomes payable when disability follows an accident sustained in the course of duty.

It appears to have been the general practice—at any rate, it certainly has been so in the numerous cases which have come under my notice—for the Registrars and Judges of County Courts *not* to allow *any* deduction in the amount of compensation (payable for such disability) on account of any pension to which an injured workman is or may become entitled. It will be observed that the Act says, "*Regard* shall be had to any benefit, etc., which the workman may receive," not that it *must be actually taken into account when fixing the amount* the injured workman is to receive under the Workmen's Compensation Act; and it would seem, from the practice to which I have referred, that it has in the past been assumed that the provisions of the Act are in form satisfied if the fact of the workman being entitled to a pension is formally stated and not overlooked, although not actually taken into account by way of deduction.

Although the point is of considerable importance, until

recently there had been no reported judicial decision upon it. The question was, however, indirectly raised in a case which went to the Court of Appeal, and in giving judgment the Master of the Rolls said: " Now, regard is not equivalent to deduction. The mode and extent of the regard are left to the discretion of the arbitrator " (Porter *v.* Whitbread and Co., 7 B.W.C.C., 1914, 205.)

The question whether a pension or superannuation allowance was " a payment allowance or benefit " to which regard should be had in fixing a weekly payment under the Workmen's Compensation Act was directly raised in a case that came before the Irish Courts, and subsequently was taken to the House of Lords in 1916.

An attendant at a lunatic asylum in Dublin was permanently incapacitated by an accident arising out of, and in the course of, his employment; he was thereupon retired by the asylum authorities, and received a gratuity and a superannuation allowance or pension under the Superannuation Acts, 1834 to 1890. A claim under the Workmen's Compensation Act was also made by the attendant, and in fixing the amount of compensation the Recorder before whom the case came stated that he had regard to all the circumstances of the case, including the fact that the man was in receipt of a pension. It appeared, however, from the Recorder's note that he had had regard to the fact that the man was in receipt of a pension, " though not the amount of it." By this it would seem that the Recorder had not deducted the *full* amount of the pension, although he had made some deduction in respect of it. In the ordinary course of events the man would have become entitled to his pension upon reaching the age of sixty, but he was incapacitated by the accident before he reached fifty.

The Court of Appeal (Ireland) set aside the award on the ground that the pension was not a payment, allowance, or benefit, to which regard should be had. This decision was, however, reversed by the House of Lords.

Lord Buckmaster, L.C., in giving judgment said: " In these circumstances it is, to my mind, unreasonable to say that regard was not to be had to the payment, . . . and the Recorder was . . . right in taking such payment into account."

Lord Loreburn concurred, and stated that " the arbitrator has a discretion as to the degree to which he will regard payments, benefits, and allowances, and can look at all the circumstances in exercising his discretion."

Lords Atkinson and Shaw also concurred, the former observing that " the employer is not liable to compensate him for the loss twice over to any extent whatever. . . . No rule could be laid down

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as to the precise amount . . . that is altogether a matter for the decision of the arbitrator" (Considine *v.* McInerney, 1916, 2 A.C., 162, and 9 B.W.C.C., 390).

It should, however, be noted that this decision only applies to the case of an injured person entitled to a weekly payment during his incapacity, and does not apply to a case where dependants are claiming in respect of the death of a workman, although a lump sum may be payable in respect of the man's death. The reason is that the provisions of Schedule I. (3) only relate to a "weekly payment," and have no reference to the compensation payable in the case of death.

From the employer's point of view it is urged that it is unfair that an injured workman who becomes entitled to a pension should also receive full compensation under the Act, especially in those cases where the pension becomes payable *simply in consequence of the accident* as distinct from length of service. It would seem to be reasonable for the employer to contend that the object of his giving a pension (especially when it is paid as the *result* of an accident) is to compensate the man in the event of inability to work or sustaining injury, and that therefore he should not be called upon in addition to pay compensation under the Act to the full extent.

There is, however, something to be said from the workman's point of view. He would, no doubt, contend that a pension is practically deferred pay, as he would probably be receiving higher wages if he had no right to a pension, and that but for the accident he would in all probability be able to serve his employer longer, and thereby in time become entitled to a larger pension. He would in some cases, no doubt, be able to urge that the accident had put an end to his opportunity for improving his position, and therefore it was fair not to take into account, by way of deduction, any sum he received as pension.

A fair way to deal with the difficulty would be to take all the circumstances of the particular case into consideration, and then decide whether the whole, or any part, of the sum payable as pension should be deducted from the amount payable under the Act; and this view seems to be supported by the decision in the case last referred to.

Right to Compensation whilst in Prison.—As an evidence of how far theory and practice are divorced, the legal intention

of those who framed it may be compared with the actual working of the Act as set forth in the following case:

A stevedore whilst working on a steamer injured his knee, ankle, and elbow, and was paid compensation at £1 a week for seven months. At the end of this period he was sentenced to a term of imprisonment with hard labour for theft, whereupon the employers discontinued the weekly payment, and the man commenced proceedings for the continuance of the weekly payment. The medical officer of the prison gave evidence that the man was still partially disabled as a result of the accident, and the County Court Judge found partial incapacity still continued, and awarded 12s. a week, notwithstanding that the man was still in prison and therefore unable to earn any wages. It was contended on behalf of the employers that the incapacity was only intended to apply to civil status, and that the man was only entitled to a declaration of liability or suspensory award, as the employers had no opportunity of giving the man light work; that in the circumstances there were no means by which the man could be submitted to medical examination at regular intervals; and that it would be improper and contrary to public policy to pay compensation in such circumstances. The Court of Appeal, however, dismissed the appeal by the employers against the decision of the County Court, and held that, as the County Court Judge had found that the man was still partially incapacitated as the result of the accident, the fact that he was confined in prison did not disentitle him to compensation. The Master of the Rolls said:

"As the learned County Court Judge has found as a fact that the man, when examined in his present residence, which happens to be Wormwood Scrubs, is now suffering partial disablement as a result of the accident, the employers' liability is not affected by reason of that which supervenes—viz., that the man cannot get out of prison now to try to work. The test is not what wages he actually earns, but what, having regard to his physical capacity, he is capable of earning . . . This is the first and main point . . . and the other points do not seem to me to be of any importance one way or the other. . . . The right to compensation cannot be said to depend on whether the employer is in a position to offer light work or not. . . . Although they (the prison regulations) do not in terms apply to the particular case, I do not think that the proper consent would not be given to any application on behalf of the employers to have the man examined, with the proper supervision, by the employers' doctor in Wormwood Scrubs."

The other Lords Justices concurred (McNally *v.* Furness, Withy and Co., Ltd., 1913, 3 K.B., 605, and 6 B.W.C.C, 664).

A similar case was decided on the same lines, in which a lunatic was awarded workman's compensation although his mental condition was not due to the accident.

CHAPTER XXXVIII

WORKMEN'S COMPENSATION ACT, 1906, AND SCHEDULED DISEASES

UNTIL the passing of the present Workmen's Compensation Act in 1906, a workman who had contracted a disease whilst following his employment, although the disease might have been directly attributable to his work, was not entitled to compensation, unless he could prove that such disease was brought about by an "accident." There was no definition of "accident" in the previous Workmen's Compensation Act, nor is there in the present Act, consequently numerous attempts were made to associate the contracting of disease with an accident.

The most important of these cases, known as the Anthrax Case, came before the House of Lords for decision in 1905, and, as the case is now frequently cited in aid of workmen who have contracted a disease which is not one of these scheduled to the present Act, particulars of the case may, I think, be usefully set out here.

> A workman was employed in a factory sorting wool, and according to the medical evidence or theory a bacillus passed from the wool to one of the eyes of the workman and infected him with anthrax, from which he died. The question to be determined in the case was whether or not the circumstances under which the man contracted the disease was an "accident" within the meaning of the Act. The arbitrator found as a fact that the anthrax was caused by the accidental alighting of a bacillus from the infected wool on a part of the deceased man's person, and stated that he could see no distinction in principle between that and the accidental entry of a spark from an anvil or the accidental squirting of water or some poisonous liquid into the eye; the only difference being, in those cases the foreign substance would be so large as to be visible, whilst in the other the foreign substance would be microscopic. The arbitrator also found as a fact that there was no abrasion or pimple; but he considered it immaterial whether there was or not, as, if there was, it was a fortuitous

accident that the bacillus alighted on that spot; and he based his judgment on the fact that there was a fortuitous intrusion of a foreign substance into the eye, which caused death.

This decision was affirmed by the Court of Appeal, and the case was taken to the House of Lords, which affirmed the view taken by the Court of Appeal.

Lord Halsbury in giving judgment said: "I think in popular phraseology, from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; but when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury' because the injury inflicted by accident sets up a condition of things which medical men describe as a disease. Suppose . . . a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease, but would anybody contend that there was not an accident causing damage? An injury to the head has been known to set up septic pneumonia, and I remember when it was sought to excuse the person who inflicted the blow from the consequences of his crime, because his victim had died of pneumonia and not of the blow."

Lords Macnaghten, Robertson, and Lindley, fully concurred in the Lord Chancellor's views, the latter adding: "The fact that an accident causes injury in the shape of disease does not render the cause not an accident" (Brintons, Ltd., *v.* Turvey, 1905, A.C., 230).

It will be seen later that anthrax is now one of the diseases scheduled to the Act, so that the decision in the above-mentioned case is not now of any importance in regard to that particular disease; but the principle of law as laid down in that case is still of the greatest import in regard to diseases which are not scheduled.

The main object of the Workmen's Compensation Act, 1906, is to compensate employees for the direct results of traumatism; but the Legislature recognized that certain diseases were insidiously brought about as the result of employment in certain trades, and these diseases are scheduled and regarded as "accidents" within the meaning of the present Act (Section 8, Schedule III.). In such cases it is not always possible to say when such disease was contracted, especially as in many cases it is of gradual onset, as, for instance, the lead-poisoning of painters or miner's nystagmus of coal-workers. It must be remembered that *only* in the case of those diseases specially scheduled under the Act can an employee recover compensation. Every disease does not come under the Act; for instance, a man may, whilst at work, contract

scarlet fever from a fellow-workman. That to a certain extent arises out of the employment, and certainly in the course of his employment. It is, however, not an accident in the ordinary sense of the word, and, not being one of the scheduled diseases, the case does not come under the Workmen's Compensation Act, and no compensation is payable by the employer.

A workman had been employed in connection with the London main sewers for many years, and during that time he had doubtless inhaled a large quantity of sewer gas. The County Court Judge found that the workman had contracted enteritis by inhaling sewer gas, and that this accelerated a pre-existing aortic regurgitation which incapacitated the man for work before the time at which such disease would otherwise have incapacitated him. The case was then taken to the Court of Appeal, which set aside the award of the County Court Judge, on the ground that there was no injury by accident within the meaning of the Act. Even this County Court pathology, which I protested against at the trial, could not be held to be an injury by accident, and, as it was not a case included amongst the scheduled diseases under the Act, the dependents of the deceased workman did not recover compensation (Broderick *v.* London County Council, 1908, 2 K.B., 807, and 1 B.W.C.C., 219).

A number of cases of a similar kind have since been decided in the same way by the Court of Appeal.

The Home Secretary has power to add to the list of scheduled diseases from time to time.

The following is a list of the diseases which have been included in the schedule to date:

Description of Disease.	*Description of Process.*
1. Anthrax	Handling of wool, hair, bristles, hides, and skins.
2. Lead-poisoning or its sequelæ..	Any process involving the use of lead or its preparations or compounds.
3. Mercury-poisoning or its sequelæ.	Any process involving the use of mercury or its preparations or compounds.
4. Phosphorus-poisoning or its sequelæ.	Any process involving the use of phosphorus or its preparations or compounds.
5. Arsenic-poisoning or its sequelæ.	Any process involving the use of arsenic or its preparations or compounds.
6. Ankylostomiasis	Mining.

Description of Disease.	*Description of Process.*
7. Poisoning by nitro- and amido-derivatives of benzene (dinitrobenzol, anilin, and others) or its sequelæ.	Any process involving the use of a nitro- or amido-derivative of benzene or its preparations or compounds.
8. Poisoning by carbon bisulphide or its sequelæ.	Any process involving the use of carbon bisulphide or its preparations or compounds.
9. Poisoning by nitrous fumes or their sequelæ.	Any process in which nitrous fumes are evolved.
10. Poisoning by nickel carbonyl or its sequelæ.	Any process in which nickel carbonyl gas is evolved.
11. Arsenic-poisoning or its sequelæ.	Handling of arsenic or its preparations or compounds.
12. Lead-poisoning or its sequelæ..	Handling of lead or its preparations or compounds.
13. Poisoning by *Gonioma Kamassi* (African boxwood) or its sequelæ.	Any process in the manufacture of articles from *Gonioma Kamassi* (African boxwood).
14. Chrome ulceration or its sequelæ.	Any process involving the use of chromic acid or bichromate of ammonium, potassium, or sodium, or their preparations.
15. Eczematous ulceration of the skin produced by dust or liquids, or ulceration of the mucous membrane of the nose or mouth produced by dust.	
16. Scrotal epithelioma (chimney-sweep's cancer).	Chimney-sweeping.
17. The disease known as "miner's nystagmus," whether occurring in miners or others, and whether the symptom of oscillation of the eyeballs be present or not.	Mining.
18. Glanders	Care of any equine animal suffering from glanders; handling the carcase of such animal.
19. Compressed air illness or its sequelæ.	Any process carried on in compressed air.
20. Subcutaneous cellulitis of the hand (beat hand).	Mining.
21. Subcutaneous cellulitis over the patella (miner's beat knee).	Mining.
22. Acute bursitis over the elbow (miner's beat elbow).	Mining.

Description of Disease.	*Description of Process.*
23. Inflammation of the synovial lining of the wrist-joint and tendon sheaths.	Mining.
24. Cataract in glassworkers* ..	Processes in the manufacture of glass involving exposure to the glare of molten glass.
25. Telegraphist's cramp	Use of telegraphic instruments.
26. Writer's cramp.†	
27. Epitheliomatous cancer or ulceration of the skin or 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.	Handling or use of tar, pitch, bitumen, mineral oil, or paraffin, or any compound, product, or residue, of any of these substances.

There is no obligation on a workman when entering fresh employment to inform his employer that he has previously suffered from any of these diseases; but if when asked to state in writing whether he has so suffered he makes a false statement, he cannot recover in the event of his having a recurrence of the scheduled disease.

Where, as sometimes happens, an employee gradually contracts such a disease (as, say, lead-poisoning), and in the course of a few months or a year works for different employers, the Act makes provision for all the employers in whose service the workman has been during the previous year to bear the liability for compensation, unless it can be shown by any such employer that the disease was not contracted in his service.

Before an employee can recover compensation as the result of suffering from one of the scheduled diseases, he must produce a certificate from one of the certifying surgeons under the Factory Acts, from whom there is an appeal to one of the medical referees under the Act.

* Compensation limited to six months in all, and four months only unless an operation for cataract has been performed.

† Compensation payable for not more than twelve months.