quite possible that we might have required caution for all expenses seeing the allegations made amounted to something like a charge of fraud on the part of the father in litigating under cover of his son's name. But upon a true construction of the previous interlocutor I think that caution for future expenses is sufficient.

LORD ADAM—I am of the same opinion. I think the only question we have to consider is, What is the meaning of the previous interlocutor? I agree with your Lordship that, *prima facie*, the interlocutor which ordains William Douglas to find caution for expenses means that he is to find caution for future expenses. It seems to me that the case of *Maxwell* v. *Maxwell*, 9 D. 797, is a judgment in that direction, and I also agree that if the question had been brought to our notice previously the interlocutor might have been different, because the Lord Ordinary seems to have found that William Douglas is the *dominus litis* in a case which is carried on in his son's name. If that is so—I do not say it is—he would have the whole benefit of the litigation if successful, and should be responsible for the expenses. But that is not the present case; we have merely to construe an interlocutor whereby a party who is litigating in his own name is ordained to find caution for expenses in general terms.

LORD M'LAREN—We cannot review the previous interlocutor whereby caution was ordered, and it is not said that there has been any change of circumstances which would entitle the defender to ask for new and more stringent conditions. The real question is, whether the bond of caution, which binds the cautioner for future expenses only, is a fulfilment of the interlocutor pronounced in October. I think it is a fulfilment, because when an interlocutor orders caution for expenses without specifying the particular expenses, I should interpret it as an order for caution for future expenses only. I do not think that the Court would, as a matter of course, order caution to be found for expenses already incurred. That would not be done unless the attention of the Court was specially directed to the matter and a motion for such caution expressly made.

LORD KINNEAR concurred.

The Court refused the prayer of the note.

Counsel for the Pursuers and Reclaimers—Guy—A. M. Anderson. Agent—John Veitch, Solicitor.

Counsel for the Defender and Respondent—A. S. D. Thomson. Agent—W. A. Hislop, W.S.

Friday, December 19.

FIRST DIVISION.

[Sheriff-Substitute at Paisley.

DOWDS *v.* BENNIE & SON.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *Sched. II., sec.* 13, *and Statutory Rules* 1898, *No.* 407, *sec.* 2—*Review of Award—Continued Incapacity due to Want of Treatment—Medical Referee—Finality.*

A workman who had sustained an injury to his ankle made an agreement with his employers whereby they undertook to pay him 10s. a-week so long as he remained incapacitated for work owing to the accident. A memorandum of this agreement was recorded in the Sheriff Court Books. Three years afterwards the employers lodged a minute asking for an order ending or diminishing the weekly payment, which they supported by a medical report to the effect that the continued incapacity of the workman was due to his having failed to adopt the proper means for the cure of the injury to his ankle. The Sheriff allowed a proof, and thereafter, finding the medical evidence conflicting, remitted to a medical referee, under section 13 of Schedule II. of the Workmen's Compensation Act 1897, and clause 2 of the Statutory Rules, No. 407, to consider the question whether the workman's continued incapacity for work was due to the accident or to his own neglect. On the referee lodging a report to the effect that the incapacity was due to the workman's neglect, the Sheriff issued an order bringing the weekly payments to an end.

In a case stated for appeal the Court *answered* the question whether the report of the medical referee was final in the *negative*, but *held* that in the circumstances of the case the order pronounced by the Sheriff was right.

The Workmen's Compensation Act enacts (Schedule I., sec. 11)—"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 for by the employer . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act . . . and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition."

Section 12—"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 . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

Schedule II., section 13—"The Secretary of State may appoint legally qualified practitioners for the purpose of this Act, and any committee, arbitrator, or sheriff may . . . appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration."

Section 2 of the Statutory Rules and Orders, No. 407, dated May 24, 1898, enacts —"Before making any reference, the committee, arbitrator, or sheriff shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter."

This was a case stated for appeal by the Sheriff-Substitute at Paisley (LYELL) in an arbitration under the Workmen's Compensation Act 1897 between James Dowds, 14 High Street, Paisley, claimant and appellant, and James Bennie & Son, Clyde Engine Works, Cardonald, respondents.

In the case stated the facts were set forth as follows—"On 31st August 1899 the appellant, who was a workman in the employment of the respondents, was injured by being struck on the right ankle of the right foot by a piece of iron. It was not denied that the accident arose out of and in the course of the appellant's employment, and on 13th February 1900 an agreement was entered into between the parties by which the respondents agreed to pay the appellant 10s. weekly during his incapacity for work as the result of the accident. A memorandum of this agreement was recorded in the books of this Court on 14th September 1900.

"On 28th September 1900 the respondents presented a petition to the Sheriff at Paisley to review the said weekly payments in terms of clause 12 of the first schedule to the Act, and on such review to end them as from 8th August 1900.

"The subject-matter of the petition was referred to one of the medical referees, and as the result of his report the said petition was dismissed on 27th November 1900.

"On 15th April 1902 the respondents lodged a minute, together with a report by Dr Thomas Kennedy Dalziel of Glasgow, once more asking review of the weekly payments and an order ending or diminishing them. Dr Dalziel's report bore that—'The present condition of the foot is due to the varicose condition of his veins, together with want of suitable exercise, that the stiffness of the ankle is due to persistent mal-position, and might well have been rectified long ago by suitable massage and movement. I do not think that the blow on the outer side of the ankle, received over three years ago, can now be considered as the cause of his defective limb.' With this certificate the appellant was dissatisfied, but he did not offer to submit himself to a medical referee in terms of Schedule I. (11). He craved a proof that he might show that as matter of fact he had used all proper means of recovery, and that his present condition is the result not of his own want of attention to his injuries but of the accident itself. This course was not objected to, and proof was taken. As the result I found as matter of fact—(1) that he had not exercised the joint by walking and endeavouring to use the ankle to anything like the extent that had been recommended by the doctors; (2) that he had not exercised it at all by passive movements, *i.e.*, by getting someone to move it for him; (3) that prior to the presenting of their first petition in September 1900 the respondents had requested him to submit himself to surgical treatment in Paisley Infirmary, where arrangements had been made by them for that purpose, and that he had declined the offer.

"The medical evidence adduced at the proof was, however, hopelessly conflicting, and I therefore referred the matter to a medical referee, in terms of the Statutory Rule No. 2, referring, *inter alia*, the following question—'Whether the respondent's' (appellant in this appeal) 'physical condition, incapacitating him from work, is due to the result of the said accident or to the respondent's neglect to exercise the injured limb and to undergo surgical treatment?'

"The medical referee reported that there is no anchylosis and no fracture, and that the present condition of the ankle is due not to the accident but to want of proper treatment since the accident took place, the present condition being that the appellant is still incapacitated for work."

In these circumstances the Sheriff-Substitute granted an order bringing the weekly payments to an end.

The questions of law for the opinion of the Court were—"(1) Are the respondents bound to continue weekly payments to the appellant seeing that since the date of the accident he has neglected to exercise the joint as directed by the doctors, has not submitted to massage and passive movements of the joint, and has refused the surgical treatment offered by the respondents as above stated? (2) Is the opinion of the medical referee final, not only as to the physical condition of the workman but also as to whether that condition is attributable to the injuries received in the accident, in a case where the reference has been made by the Sheriff, after hearing all medical evidence tendered by either side, under No. 2 of the Statutory Rules and Orders 1898, No. 407?"

Argued for the appellant—The Sheriff had proceeded on the report of the medical referee as if that were conclusive. That was an error, because although the report of a medical referee might be conclusive if made under section 11 of Schedule I (quoted *supra*), as was held in *M'Avan* v. *Boase Spinning Co.*, July 11, 1901, 3 F. 1048, 38 S.L.R. 772, the reference in the present case was not made under that section, and was therefore not conclusive. If it were merely to be taken as part of the evidence, all that would have been justified would have been an order diminishing the

weekly payment, because its result, taken with the other evidence, was to show that the appellant could by proper treatment become capable of light work. On such facts an order putting an end to the weekly payments was improper, though they might be diminished — *Irons* v. *Davis & Timmins, Limited* [1899], 2 Q.B. 330; *Freeland* v. *Macfarlane, Lang, & Co.*, March 20, 1900, 2 F. 832, 37 S.L.R. 599. There was no rule that a workman was bound to adopt whatever treatment his employer's doctor recommended or else forfeit his right to compensation.

Argued for the appellant—The Sheriff was right and the procedure regular. It was not necessary to argue that the report of the referee was conclusive; there was no reason to suppose that the Sheriff had treated it as conclusive. But it was evidence on which, with the other evidence in the case, he was justified in finding that the incapacity to work was now due, not to the accident, but to want of treatment. The means of cure recommended were easy and safe, and the workman was bound to have adopted them.

At advising—

LORD ADAM—The appellant in this case on the 31st August 1899, while in the employment of the respondents, received an injury to the ankle of his right foot. An agreement was entered into between them on 13th February 1900, which is duly recorded in the Books of the Sheriff Court, by which the respondents agreed to pay him 10s. a-week during his incapacity for work. On 28th September 1900 the respondents applied under the 12th clause of the First Schedule of the Act to have the weekly payments ended, but that application was refused on 27th November 1900. Proceeding apparently under the 11th clause of the schedule the respondents had obtained from a duly qualified practitioner a certificate upon his condition, which was in these terms:—"The present condition of the foot is due to the varicose condition of his veins, together with want of suitable exercise; the stiffness of the ankle is due to persistent mal-position, and might well have been rectified long ago by suitable massage and movement. I do not think that the blow on the outer side of the ankle received over three years ago can now be considered as the cause of his defective limb."

The appellant was dissatisfied with this certificate, but as he did not offer to submit himself for examination to a medical practitioner appointed under clause 13 of the Second Schedule of the Act, the respondents thereafter again brought the matter before the Sheriff as arbitrator under the 12th clause of the schedule by a minute dated 15th April 1902 craving review of the weekly payments, and an order ending or diminishing them, and they produced along with the minute the medical certificate which I have quoted above.

It is sufficiently clear that this certificate dealt not only with the present condition of the foot, but also with the causes to which that condition was attributable.

When the case accordingly came before the Sheriff the appellant asked for a proof (which was not objected to) that he had used all proper means of recovery, and that his present condition was the result, not of his own want of attention to his injuries, but of the accident itself.

On considering the proof the Sheriff found in fact the various particulars in which, in his opinion, the appellant had failed to use or submit to the proper means of recovery recommended by doctors for his treatment. This, however, did not exhaust the case, for the question remained as to how far the existing condition of the appellant's foot was to be attributed to his failure to use these means.

The Sheriff stated that he had difficulty in deciding this question, because the medical evidence adduced at the proof was hopelessly conflicting, and he took the course of referring it to a medical referee in terms of the statutory rule No. 2.

It appears to me that this was a purely medical question, and that the Sheriff was entitled to refer it as he did, and was right in so doing.

The Sheriff received the report in due course. It was for him to construe it, and he states in the case that the effect of the report is "that there is no anchylosis and no fracture, and that the present condition of the ankle is due, not to the accident, but to want of proper treatment since the accident took place," and he granted an order bringing the weekly payments to an end.

It is clear that, had the facts admitted it, a question might have been raised as to whether the effect of proper treatment at the time would have completely removed the appellant's incapacity for work, or would only partially have done so, but no such question is raised, and I think that the parties throughout have treated the case on the footing that the only question for consideration was, whether the appellant's conduct had prevented an entire cure.

I think also that the words used are not very happy, when it is stated that the present condition of the ankle is due, not to the accident, but to the want of proper treatment, for undoubtedly the present condition of the ankle is the result of the accident combined with the want of proper treatment. But I think the Sheriff means to affirm that had there been proper treatment the ankle would have been cured, and therefore that its present condition is entirely due to want of proper treatment.

That being the history of the case, the first question in law which we are asked is, whether the respondents are bound to continue weekly payments to the appellant, seeing that he has neglected to use, and refused to submit to, the treatment mentioned in the case. In other words, whether, although he is still totally incapacitated for work, he has by his own conduct disentitled himself from claiming such weekly payments.

I am far from thinking that in every case a workman who has been incapacitated from work by an accident is bound to submit to any medical or surgical treatment that may be proposed, under the penalty, if he refuses, of forfeiting his right to his weekly payments. It is easy to suppose a case where a more or less serious operation is proposed with more or less probability of a successful cure, and in such a case I think it would be out of the question to say that the workman was bound to submit to it. But that is not the kind of case we have to deal with. In this particular case the injury was comparatively slight, and the treatment proposed simple and common and brought within his reach, and the benefit which would have resulted therefrom not doubtful. I think it was such treatment as any reasonable man would have adopted.

I think therefore that the present condition of the appellant's ankle is truly due to his own fault and neglect, and that therefore the question should be answered in the negative.

The second question is, whether the opinion of the medical referee is final, not only as to the physical condition of the workman, but also as to whether that condition is attributable to the injuries received in the accident, in the circumstances in which the reference was made in this case and which I have detailed.

It will be observed that the reference was not made under the 11th clause of the schedule, in which case it is declared that the certificate of the medical practitioner shall be conclusive as to the condition of the workman. It was not made at the instance of the parties, or either of them, but it was made at the instance of the Sheriff himself for his own guidance in order the better to enable him to dispose of the case. There is nothing in the Act directing the Sheriff to take such a report as conclusive. I see nothing to prevent him from taking such a report into consideration with the rest of the evidence, and giving such weight to it as he may think right. I am therefore of opinion that this question should be answered in the negative. But I think that the Sheriff's judgment which gives effect to the report is final, because it is a judgment on a question of fact.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court answered the questions in the case in the negative.

Counsel for the Appellant—Watt, K.C. —Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Campbell, K.C.—C. D. Murray. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Friday, December 19.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

TAIT *v.* MUIR.

Burgh—Trade Incorporation—Appropriation of Funds of Incorporation by Surviving Members—Burgh Trading Act 1846 (9 *and* 10 *Vict. cap.* 17)—*Judicial Factor—Title to Sue—Right of Judicial Factor to Recover Sums Appropriated before his Appointment.*

Held (1) that a corporation recognised by statute must subsist till dissolved by statutory authority, and that its funds can only be administered by the corporators, whether many or few, for the purposes recognised by its existing regulations; (2) that consequently the surviving members of a burgh trade incorporation, whose exclusive privileges were abolished by the Burgh Trading Act 1846, were not entitled to divide among themselves any part of the funds of the incorporation; and (3) that a judicial factor appointed by the Court upon the estate of the incorporation had a good title to sue the members of the incorporation, and the representatives of deceased members, for funds so appropriated prior to his appointment.

In June 1901 John Scott Tait, C.A., Edinburgh, judicial factor on the estate of the Incorporation of Tailors of Edinburgh, conform to act and decree in his favour by the Lords of Council and Session, dated 19th November and 18th December 1900, and 22nd January 1901, and extracted 8th February 1901, raised an action against Robert Gillespie Muir, as an individual, and against the trustees and executors of the late James Dundas Grant, as such trustees and executors. In this action the pursuer concluded, *inter alia*, (1) for decree against the defenders jointly and severally for £2618, 16s., or otherwise for decree against Muir for £1079, 8s., and against Grant's trustees for £1539, 8s.; and (2) for decree against the defenders jointly and severally for £1150, 0s. 10d., or such larger sum as might be found due as interest at 31st March 1901 on the sum mentioned in the first conclusion, or otherwise for decree against Muir for £465, 2s. 10d., and against Grant's trustees for £684, 18s., or for such larger sum as might be found due as interest at said date.

The pursuer averred, *inter alia*, that at the date of his appointment as judicial factor the defender Muir was the sole surviving member of the Incorporation, that from 1891 to 1900 Muir and James Dundas Grant were the only members, and that between 27th October 1886 and 31st March 1901 sums amounting to the principal sum sued for had been illegally withdrawn from the capital funds of the Incorporation by the defender Muir and by Dundas Grant