LORD GUTHRIE — I am of the same opinion. I think this is a case where it is perhaps unfortunate that the learned arbitrator did not sit with a medical assessor. No doubt had the question been anticipated that would have been arranged, but we have the arbitrator's decision, if not strictly speaking his finding, to the effect that by the proposed operation two things would result — the pain in the appellant's foot would be removed and his former wage-earning capacity restored to him. I assume that the only possible cure of this man's foot is by the proposed operation.

Now the cases show that that is not conclusive. You may have all the doctors agreeing in the view that an operation would effect a cure, but there are certainly two exceptional cases in either of which the workman's refusal to undergo the operation which would effect the cure is held not to be unreasonable. In the first place, if a medical man on his behalf thinks, as apparently in *Sweeney's* case Professor Annandale did, that a cure could be effected without an operation, then the refusal to undergo the operation might not be unreasonable. In the second place, as appears from *Tutton's* case, if the cure can only be effected at the cost of substantial risk or substantial suffering, then again the workman's refusal is not considered unreasonable.

Here we have neither of these elements. Nobody says that there is any other way of restoring this man from total incapacity to complete recovery except by operation, and all the medical men agree that there is neither substantial risk nor prospect of substantial suffering. It seems to me that in ordinary life the appellant would be considered unreasonable by reasonable people, and accordingly the arbitrator's finding is justified when he says that the appellant's present incapacity was fairly to be ascribed to his refusal to undergo the proposed operation, and that he was not entitled so to refuse.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Sandeman, K.C.—Morton. Agents—Hume M'Gregor & Company, S.S.C.

Counsel for the Respondents—A. O. M. Mackenzie, K.C.—Macmillan, K.C.—Keith. Agents—Auld & Macdonald, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Sheriff Court at Hamilton.

KENNEDY *v.* WILLIAM DIXON, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I* (15)—*Certificate of Medical Referee—Ambiguity.*

An arbitrator under the Workmen's Compensation Act 1906 is entitled to send back to the medical referee for explanation a certificate which is ambiguous.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), Schedule I (15) enacts—"The medical referee to whom the matter is referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment . . . and that certificate shall be conclusive evidence as to the matters so certified."

In an application for review of the compensation payable under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) by William Dixon, Limited, Holytown, *respondents*, to Charles Kennedy, miner, Wishaw, *appellant*, the Sheriff-Substitute at Hamilton (HAY SHENNAN), acting as arbitrator, ended the compensation, and at the request of the appellant stated a Case for appeal.

The Case stated—"(1) The appellant, on or about 22nd December 1911, received injury to his right eye in the course of his employment as a miner with the respondents at their Carfin Colliery. (2) The defenders paid compensation to the appellant at the rate of ten shillings and one penny per week down to 12th August 1912. No question was raised in the present arbitration as to the compensation for the period between 12th August 1912 and 18th November 1912. (3) Parties lodged a joint minute upon 9th November 1912 in the following terms:—'In respect that the said Charles Kennedy, on or about 22nd December 1911, received an injury to his right eye while in the course of his employment with the defenders at their Carfin Colliery, and by agreement between the parties was paid compensation under the Workmen's Compensation Act 1906, and in respect the defenders now aver pursuer has so far recovered from his injury as to be fit for light work, which contention pursuer denies, and the parties being at variance and no agreement being likely to be arrived at: Therefore the said Charles Kennedy and the said William Dixon, Limited, crave the Court, in terms of section 15 of the First Schedule to the Workmen's Compensation Act 1906, to refer the matter to the medical referee, being an eye specialist, including in such reference the question whether any incapacity from which the said Charles Kennedy may now suffer is due to said accident.' (4) The reference was

sent by the Sheriff-Clerk on 12th November 1912 to Dr Freeland Fergus, Glasgow, being a medical referee under said Act, who reported on 18th November 1912 as follows:—'I hereby certify as follows—1. The said Charles Kennedy is now recovered from a serious injury to the right eye which has completely and permanently deprived him of the use of the eye. The injured organ is now quite quiet, and there is no pain even on deep pressure, and his condition is such that he is fit for any work which can be done on the surface by a man with one eye. 2. The incapacity of the said Charles Kennedy is not now due to the accident although it has been so probably till now. There is a distinct colour scotoma present, which I believe is due to his use of strong tobacco.'

"I was of opinion that, this being a reference by agreement under Schedule I (15) of the Workmen's Compensation Act 1906, the second answer by the medical referee was conclusive on the question of the cause of the appellant's existing incapacity, and that I was bound to end the appellant's compensation. While my impression from reading the combined findings was that possibly the medical referee intended by the second answer merely to find that the physiological effects of the accident had ceased and determined, I was of opinion that looking to the absolute terms of the second finding I was not entitled to submit it to construction. Further, I was of opinion that in the case of such a reference I had no power to send the report back to the medical referee for explanation. Accordingly on 5th November 1912 I ended the compensation as from 18th November 1912."

The *question of law, inter alia,* was—"Had I power to send the report back to the medical referee for explanation?"

LORD DUNDAS — [*After dealing with questions with which this report is not concerned*]—I should like to add a single word—though it is not necessary to do so, looking to the way in which the case is to be disposed of — in regard to the third question put to us. The learned arbiter expresses the opinion that in the case of a reference like this he had no power to send the report back to the medical referee for explanation. I do not agree with that view. Where the report of a referee is unintelligible to the arbiter, or ambiguous, or open to construction, I can see nothing to prevent him sending back the report for an explanation as to its meaning.

LORD SALVESEN — [*After dealing with questions with which this report is not concerned*] — I entirely agree with what Lord Dundas has said, and I think it is quite necessary that we should express our opinion because of the view which the Sheriff-Substitute has taken. I cannot lend any countenance to the view that when there is a living man who has given a report, and there seems to be great difficulty in getting at his meaning, one should be compelled to solve that difficulty on a construction of the language he has used when the readiest method of getting at his meaning is to ask the man himself. I therefore disagree with the learned Sheriff in holding that his hands are tied by the statute or by any other consideration from asking the medical referee what he meant if there is an obvious ambiguity in his report.

LORD GUTHRIE — [*After dealing with questions with which this report is not concerned*] — I agree also in the view expressed by Lord Dundas and by Lord Salvesen that the Sheriff was wrong in thinking that, the medical referee's findings being ambiguous, he was not entitled to send them back to ascertain exactly what was meant.

The LORD JUSTICE-CLERK concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Crabbe Watt, K.C. — J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents — Horne, K.C.—Strain. Agents—W. & J. Burness, W.S.

Wednesday, February 19.

FIRST DIVISION.

(SINGLE BILLS.)

BRITISH ASSETS TRUST, LIMITED, PETITIONERS.

Company — Process — Capital — Petition — Re-organisation of Share Capital—Advertisement — Companies Consolidation Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 45.

In a petition presented under section 45 of the Companies Consolidation Act 1908 for the confirmation of special resolutions which modified the conditions contained in the company's memorandum so as to re-organise its share capital, the petitioners having moved for intimation of the petition without advertisement, the Court *ordered* intimation as craved.

The Companies Consolidation Act 1908 (8 Edw. VII, cap. 69), section 45, enacts—"(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to re-organise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes. . . . (2) Where an order is made under this section an office copy thereof shall be filed with the Registrar of Companies within seven days after the making of the order, or within such further time as the Court may allow, and the resolution shall not take effect until such a copy has been so filed."

The British Assets Trust, Limited, Edinburgh, *petitioners*, presented a petition