Wednesday, January 26.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

POLLICH AND ANOTHER *v.* HEATLEY.

Arbitration—Charter-Party—Demurrage—Exhaustion of Reference—Expenses of Arbitration not Dealt with by Arbiters—Interest on Demurrage Claim not Dealt with by Arbiters—Reduction.

An action seeking to recover a certain sum as demurrage with interest at 5 per centum from the date of citation having been raised against charterers, they pleaded that the action fell to be sisted in virtue of the following arbitration clause occurring at the end of the demurrage clause in the charter-party—"Any question arising under this section 3 shall be referred to a committee, consisting of one shipowner, to be nominated by the owners, and one coal shipper, to be nominated by the charterers, and should they be unable to agree, the decision of an umpire to be selected by them shall be final." The Lord Ordinary of consent sisted the action, and the parties as a shorthand way of stating the claim sent the committee copies of the claim in the action. The committee made an award of demurrage calculated at a certain rate per ton for a certain number of days, but the award made no mention of interest or of the expenses of the arbitration. Thereafter the pursuers brought an action of reduction of the award on the ground that the committee had not exhausted the reference, in that there had not been dealt with either interest or expenses.

Held (1) that the putting of the record before the arbiters did not submit any question of interest, which fell, so far as claimed in the action, to be dealt with by the Lord Ordinary, and (2) that the fact that expenses had not been dealt with, even assuming that had been submitted, was no ground for reduction.

Opinion (*per* the Lord President and Lord Kinnear) that the committee appointed under the contract to submit, acted as informal arbiters.

Opinion (*per* Lord Johnston) that the reference was more akin to a submission to valuators.

By the Lord President—"When various disputes are submitted, and an award goes out which is a final award, if that award does not deal with some of the matters submitted, then it cannot stand—even so far as it does deal with matters submitted—because it has not exhausted the submission. The matter of expenses is not part of the submission. There may be cases in which special power is given to an arbiter to dispose of expenses, but that really is pleonastic. The matter of expenses is incidental to the conduct of the case, and there is an inherent power in the tribunal to grant them just as in this Court we are able to grant expenses even though there may be no conclusion for them. I cannot see how the fact that the question of expenses is not disposed of falls within the doctrine at all. I do not think it is a case of the submission not having been exhausted; it is merely that no expenses have been awarded."

Mat. Pollich, shipowner, Trieste, managing owner of, and as such representing the ownership of the foreign vessels "Alga" and "Marina," both of Trieste, and Frank Pringle Lauder, Edinburgh, mandatory for the said Mat. Pollich, raised an action against W. R. Heatley, coal exporter, Glasgow, and against Richard Mackie, shipowner and coal exporter, Leith, and C. R. France, coal exporter, Glasgow, for any interest they might have. The pursuers sought reduction of an award or decree-arbitral granted by the said Richard Mackie and C. R. France. This award found that the amount due to the pursuers for demurrage was £374, 6s. 3d. The action was defended by the defender first called.

The pursuers pleaded, *inter alia*—"(1) The said arbiters not having dealt, as they ought to have done, with the questions of interest on the amount of the demurrage awarded and the expenses of the arbitration, and the said questions being embraced in the said reference, the said decree-arbitral is null and void, and the same should be reduced, with expenses."

The defender pleaded, *inter alia*—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the action. (4) The pursuers' averments, so far as material, being unfounded in fact, the defender should be assoilzied."

The *facts* as to the nature and origin of the action are given in the opinions of the Lord Ordinary (SALVESEN), *infra*. As to the true import of the facts see the Lord President's opinion.

On 13th March 1909 the Lord Ordinary before answer allowed parties a proof of their averments and to the pursuers a conjunct probation.

Opinion.—"This is an action for the reduction of an award in a mercantile arbitration. The pursuer, who is a shipowner at Trieste, on 28th November 1907 raised an action in the Court of Session against the defender to recover demurrage in respect of the detention of two vessels which the defender had chartered. The charter-party contained a reference clause; and accordingly after hearing parties I sustained a plea that the action fell to be sisted until an award had been obtained from the arbiter, whose decision the parties had agreed should be final. My interlocutor was acquiesced in, and the matters in dispute were subsequently submitted to Provost Mackie, Leith, and Mr C. R. France, Glasgow. Neither party contemplated any formal proceedings, but each handed a print of the record of the charter-party and other documents relating to the

claims to the respective arbiters, and it was assumed on all hands apparently that the information contained in these documents would enable the arbiters to reach a decision. The arbiters accordingly, without hearing parties, issued the award quoted in the print. The total demurrage found due under this award was £374, 6s. 3d.; the pursuer thereupon enrolled the case before me and moved me to consider and decide the question of interest and expenses, which had not been expressly dealt with by the arbiters. I took the view that I had no power to adopt either course.

"The interlocutor giving effect to this opinion was not submitted to review; but the pursuer has now brought this action to reduce the award, on the ground that the arbiters have not exhausted the reference. He says that the arbiters were not merely entitled but bound to deal with the question of interest and expenses, and that they did not do so because they erroneously took the view that these matters were not for their determination but for that of the Court. The pursuer asked a proof of his averments, but the defender maintained that the action should be dismissed as irrelevant.

"Before bringing the action the pursuer proposed that the parties should concur in asking the arbiters to decide these two questions, but the defender declined to do so. This attitude lends some support to the statement of the pursuer with regard to the view which the arbiters took, and I think it is unfortunate that there should be a new litigation with regard to a sum which in comparison with that which the arbiters have already awarded to the pursuer must be inconsiderable.

"If the arbiters were not asked by the parties to decide any question except the amount of demurrage incurred to the two vessels, it would of course not be a ground for setting aside their award that they had not dealt with questions which might competently have been brought before them. On the pursuer's averments as now amended, however, I cannot hold it to be clear that the question of interest, at least, was not submitted to their adjudication. The summons in the earlier action, a copy of which was sent to each arbiter, embraces a claim for interest from the date of citation; and *prima facie* this would seem to have been submitted to the informal tribunal just as much as the principal sum sued for. The question, however, remains whether the failure of the arbiters to dispose of one of the matters submitted to them is a good ground of reduction of such an award.

"The leading authority to which I was referred by the pursuer on the subject is a very old one—*Halkerton* v. *Wishart*, 30th June 1625, M. 645. The report is short, but appears to be in point. It is in these terms—'Arbiters being chosen by any parties, they are holden to decide all the differences referred to them by the compromit; otherwise, if they decern in one part and leave the other claims undecided, it will furnish an exception to any of the parties that find themselves hurt thereby.' This case is referred to by all the text writers on 'Arbitration' as an authority; and although there is no subsequent decision where the Court reduced an award on the ground that it did not exhaust the reference, there are cases where the validity of such a plea was impliedly confirmed—*Finlay* v. *Campbell*, 12 S. 792; *George* v. *Milne*, 14 S. 404, and *Mackenzie*, 3 D. 318. In the case of *George*, Lord Gillies indicated an opinion that the arbiter had not exhausted the reference, and if so, that the award was reducible. The majority of the Court were, however, of opinion that he had in effect disposed of all the matters in dispute which were submitted; but they did not indicate any dissent from the opinion of Lord Gillies. In the case of *Mackenzie* it was laid down that when a judicial reference 'was clear in its terms, correct in its form, embracing nothing which was not referred, and exhausting all that was referred, it was not competent for the Court to review such award on its general merits or set it aside.' This clearly implies that it would be a ground of reduction of an award that the arbiter had not exhausted the reference.

"The defender quoted no Scotch decisions in support of their view, but he referred to certain decisions in England, the first of these in point of date being the case of *Smith* v. *Johnston*, 15 East, 213. The decision there was merely to the effect that where there has been a general reference of all disputes the Court will not allow an action to be brought afterwards in respect of matters which might have been but were not brought before the arbitrators. The decision in *Rees* v. *Waters*, 16 M. & W. 263, is to the same effect. Pollock, C.B., in giving judgment, said—'I am of opinion that a reference of all matters in difference does not mean a reference of all possible matters, but of all matters which are brought before the arbitrator; and if the parties omitted to solicit his attention to a matter not being one of the questions in the proceedings themselves, no objection can be made to the award for not adjudicating on it.' This implies that the award may be objected to if the arbitrator fails to deal with one of the matters which have been expressly submitted for his decision. In *Hunt* v. *Hunt*, 5 Dowling, 442, an award was actually set aside, *inter alia*, on the ground that the arbitrator 'had not either specifically or by necessary implication adjudicated on each issue.' The law would therefore seem to be the same in England and Scotland; and as after a general reference of all disputes a party is barred from taking action to enforce a claim which he has failed to submit, it would seem to follow that if he has in fact submitted a claim on which the arbiter has failed to adjudicate he must be entitled to obtain a remedy by setting aside the award. I am accordingly of opinion that on the assumption that the claim for interest was duly submitted, and still more, if the claim for expenses of the reference was made, and

the arbiters failed to deal with these two claims or either of them on the mistaken view that they had no jurisdiction to do so, the award must be set aside. I shall accordingly allow the pursuer a proof of his averments."

On 8th July 1909 the Lord Ordinary sustained the reasons of reduction and reduced the award.

Opinion.—"I refer to the opinion which I delivered after a hearing in the procedure roll, in which I stated my views as to the law applicable to a case of this kind. I have now to consider whether as a result of the proof the pursuer has succeeded in establishing that the questions (1) of interest upon the sum awarded in name of demurrage, and (2) of expenses in the arbitration, were duly submitted to the arbiters. If so, it is abundantly plain from their evidence that they did not consider these questions, and that the inference which would otherwise have been drawn from their award that the pursuer's claims on these heads were disallowed was erroneous.

"The arbitration was conducted in a very informal manner. Each party submitted to the arbiter nominated by him such documents as he thought were required in his interest, and no communication took place between the parties and their agents on the one hand and the arbiter nominated by the opposing party on the other. The arbiters interchanged views by letter, and the terms of their award were thus adjusted. A proposal was at one time made that the arbiters should meet with parties' agents before the award was issued, but the meeting which had been arranged never took place owing to one of the arbiters being unable to attend, and the award was issued without parties having been heard or having any opportunity of stating before the tribunal the views which they took on the matters now in dispute. I think it is exceedingly unfortunate that the proposed meeting never took place, because I have no doubt that the matters of interest and expenses with which the arbiters did not deal would then have been brought under their notice and have been decided by them.

"There is very little reference in the course of the correspondence with the arbiters to the question of interest, no doubt because it was treated by the parties as entirely subsidiary. The records in the actions, however, in which interest was claimed on the sum sued for from the date of citation were sent to each arbiter; and on 6th April 1908 the defender's agent wrote to the pursuer's agent suggesting that a minute should be lodged 'agreeing to hold the closed record as the parties' pleadings in the arbitration.' No minute was ever lodged, but parties seem to have proceeded on this footing. The only other reference to the matter of interest in the voluminous correspondence that took place is to be found in No. 35 of process, which is 'a statement of facts for use of Provost Mackie *re* demurrage claims on s.s. "Marina."' This document contains the following paragraph — 'The claim for demurrage on the "Marina" is £271, 15s. 6d. Of course the questions of interest and expenses fall to be determined.' There is no doubt that Mr Mackie received this paper at the time, but it is equally clear that he did not communicate it to his co-arbiter; and in his communings with the latter he never referred to the question of interest at all. It was strenuously argued that the claim for interest was one which ought to have been brought to the notice of both arbiters, and that as it was never brought to the notice of the defender's arbiter at all, it could not be held to be part of the matters referred. There would be great force in the argument if this had been a formal reference. Here, however, it seems to have been understood that the pursuer should submit to Mr Mackie his claims in the arbitration which it was assumed he would communicate to his co-arbiter, that the parties should not correspond with the arbiter nominated by the other side, and that all the defenders' agent required to do was to furnish Mr France with the information and the arguments tending to minimise the claim. If, therefore, the claim was sufficiently made to Mr Mackie by the pursuer, as I think it was by the document in question, I think that was all the parties contemplated. Apart from this, both arbiters had prints of the records in the actions before them; and they were thus both apprised that interest on the amount of demurrage which might be awarded formed part of the pursuer's claim. The fact seems to have been that the matter was entirely overlooked, which, having in view its relative unimportance, is by no means surprising, although it demonstrates the inexpediency of arbiters proceeding to issue a final award without hearing parties or without giving them an opportunity of representing against the proposed findings. Even in formal arbitrations after the fullest hearing it is deemed expedient to issue proposed findings so that no possible point may be overlooked or dealt with on mistaken assumptions.

"On the question of the expenses incurred in the arbitration it is admitted that the arbiters and they alone had jurisdiction to deal with these. In the correspondence between the arbiters and the parties' agents hardly any reference is made to the question, and that for the obvious reason that until it was known what amount of demurrage was found to be due in each case the question of expenses could not be properly decided, for there had been various offers by the defender which might turn out to have exceeded the total amount awarded. From the letters which passed, however, between the parties' agents, and also to some extent from their parole communings, it is plain that the agents contemplated that this was a matter with which the arbiters would deal; and in the statement No. 35 to which I have already referred the pursuer's agent made express reference to it. Here again Mr Mackie seems to have failed to bring the matter under the notice of his co-arbiter;

and it was not in the interests of the defender, having in view the award on which the arbiters agreed, that the matter should be mooted by Mr France. Mr Mackie, indeed, had a telephonic conversation through his clerk with the pursuer's agent, and inferred from what took place then that the arbiters were not to deal with the question of expenses. I am satisfied that Mr Scott did not withdraw this question from the arbiters, but that what he really asked was that the matter should be reserved, so that when the award as to the amount of demurrage had been issued the arbiters might be asked to deal with it. It was strenuously maintained on the correspondence following the issue of the award that Mr Scott all along took the view that the arbiters had no power to deal with expenses, and had accordingly withdrawn the matter from their consideration. No doubt when the award was issued Mr Scott took up the position, on the advice of counsel, that the omission might still be rectified by an application to the Court, but I accept his explanation on the matter, which indeed is alone consistent with the paragraph in No. 35 to which I have already referred. The result is that the question of expenses was not considered at all by the arbiters, Mr Mackie believing either that it had been withdrawn from their consideration or that it fell to be dealt with by the Court, and Mr France being perfectly pleased to concur in an award which implied that expenses were not to be awarded to either party. On this point also I think it is plain that there was a miscarriage, for which the pursuer and his agents are not to blame, but which resulted from Mr Mackie's misunderstanding and the informal way in which the whole proceedings were gone about.

"The net result is that the pursuer has not had his claims for interest and expenses adjudicated upon by the arbiters, although these matters were within the reference and were submitted to the arbiter nominated by him. The claim for expenses, although believed by Mr Mackie to be of small importance, involved really a substantial sum, estimated by Mr Scott at close on £100. It is difficult to see how so large an account could be incurred, but it must be kept in view that as the pursuer was a foreigner all the correspondence and investigations had to be conducted by his law agents, who were of course entitled to charge for their trouble. Mr Mackie appears to have overlooked this entirely, having had in view arbitrations of the same informal kind where the correspondence and inquiries were made by the parties themselves, and where the main expense chargeable against an opponent would have been the arbiter's fee.

"Holding as I do that the claims for interest and expenses were within the reference and were submitted to the tribunal in the way contemplated by the parties, I have no alternative but to reduce the award, following the decisions to which I referred in my previous opinion. The result is regrettable, because neither party has any fault to find with the decision of the arbiters of the principal matter submitted to their decision, and it may well be that if the arbiters had considered and decided the claims in question the amount of the award in favour of the pursuer would not have been materially increased looking to the views expressed by Mr Mackie in the witness-box. At the same time the pursuer was entitled to have these matters disposed of one way or the other, and his only remedy appears to be a reduction of the award. This of course involves that the proceedings should be commenced *de novo* either before the same arbiters or before other two selected by the parties. All this procedure might have been avoided had the defender consented, as I think he ought to have done, to the arbiters disposing of the claims for expenses and interest after the final award had been issued. Instead of this he stood upon what he regarded as his legal rights, and as in my opinion he has proved to be wrong he must take the consequences. I shall accordingly reduce the award and find the defender liable in expenses."

The defender reclaimed, and argued—(1) The questions of expenses of the arbitration and interest on the demurrage were not submitted to the arbiters. Even had the question of interest been submitted, it could only have been interest prior to the closing of the record. The failure of the pursuer's arbiter to communicate to the defender's arbiter the statement of facts referred to by the Lord Ordinary, saying, "the questions of interest and expenses fall to be determined," was a failure rather as agent for the party than as arbiter, and in any case that claim had not been communicated to the other arbiter. The charter-party and the record were the only documents which could be looked at to determine what the arbiters were asked to decide. (2) The question of expenses if ever submitted was withdrawn. (3) The pursuers had barred themselves by their actings from insisting in the action of reduction.

Argued for the pursuers (respondents)—This was an informal arbitration, and it was understood that each arbiter was to communicate any information given to him to the other; the parties took the risk of this being done. The arbiters had thus been asked to deal with interest and expenses. In any case the question of interest was by inference submitted to the arbiters under the clause of reference in the charter-party. Moreover, the arbiters had prints of the records before them showing that interest was claimed. The action had been sisted in order that the whole subject-matter therein might be settled by arbitration.

LORD PRESIDENT — This is a case in which I propose to advise your Lordships to give a judgment in a certain way, and, candidly, I do so with great regret, because it is one of those unfortunate cases where

the real question between the parties was a very small one, and where through, I think, mistaken views there has been an immense amount of procedure, the result of which, to my mind, has been really abortive, and has been the cause of a large amount of expense out of which no gain will be reaped by anyone. It is a case where the Court cannot help itself; we are bound to give judgment according to what we conceive the law applicable to the case to be.

The facts out of which these matters arise are these—The defender in the present action Mr Heatley, coal exporter, entered into certain charter-parties for the hire of two vessels called the "Alga" and "Marina." There is no difference between the cases of the two ships; therefore for clearness sake I shall simply deal with the one and not with the other. The charter-party which we have got is an ordinary charter-party, and the only clause to which I call your Lordships' attention is the third, and even that I need not read at length, because it is a very ordinary demurrage clause. But at the end of it there is this stipulation—"Any question arising under this section 3 shall be referred to a committee consisting of one shipowner to be nominated by the owners and one coal-shipper to be nominated by the charterers, and should they be unable to agree the decision of an umpire selected by them shall be final."

Well, the ships executed their voyages; they were kept waiting, and demurrage was incurred. A claim was made for demurrage, but the parties were not agreed as to how much was due, and the result was that a couple of actions were raised in the Court of Session for the demurrage. I take one of these actions as enough—the action raised in respect of the "Alga." That action was signeted on 28th November 1907. It is an ordinary petitory action so far as the conclusions are concerned, and asks that the defenders should be decerned and ordained to pay the sum of £141, 9s. 1d. sterling, with interest thereon at the rate of 5 per cent. per annum from the date of citation to follow thereon. The condescendence sets forth the position of the parties, the charter-party, the voyage and the detention, and then sums up the claim thus—"For the said demurrage of 116 hours the defender is responsible, and is liable therefor to the pursuers at the rate of 4d. per net registered ton per day fixed by the charter-party, amounting in all to £141, 9s. 1d., the sum sued for."

That claim accordingly is made, and is really so simple and plain that its import cannot be disputed. The party comes into Court and says—"Under the charter there has been incurred to me a certain liability in money for demurrage; I reckon the demurrage at so many hours at a certain rate; that amounts to a certain sum; and I ask you for that sum plus interest at 5 per cent. from the date of citation." I go through this very elementary matter in order to make it quite clear, because it is just because this has not been kept in view that some mistakes have arisen. That action is for a sum due for demurrage; it does not conclude for interest as from the date of the demurrage, but only for interest as due after the date of the citation. It is the ordinary conclusion in every petitory action where a sum is demanded and where interest does not run upon the debt itself until demand. That action was brought before the Lord Ordinary, and in the defences the defender tabled the arbitration clause which I read out of the charter-party, and accordingly the Lord Ordinary closed the record and sisted process until an award in the arbitration proceedings should be obtained. That was a perfectly proper and perfectly natural interlocutor. It was pronounced, as we find, of consent; but if it had not it would not have mattered, because it would have been the regular interlocutor which would fall to be pronounced in accordance with the practice here, of which I think the earliest instance in this Court is the well-known case of *Levy* v. *Thomson*, 10 R. 1134, 20 S.L.R. 753, a practice which subsequently obtained the approval of Lord Watson in the House of Lords in the *Talisker Distillery* case (*Hamlyn & Company* v. *Talisker Distillery*, 21 R. (H.L.) 21), 31 S.L.R. 642.

Your Lordships will notice—and here again it seems very plain that failure to notice has been the cause of much that has happened—that this is in no sense either a judicial reference—which, of course, is a reference of the action—nor is it in any sense a remit by the Lord Ordinary to do anything. The Lord Ordinary is asked to grant decree for the sum of money. The parties come before him and they say—"We admit that the determination of the particular sum due has by contract been committed to another tribunal, not the Court; therefore we ask the Court to wait, before it pronounces the decree which is asked, until that other body has settled the sum for which decree will then fall to be granted."

Accordingly the parties went before this committee. Now what could they go upon? They could only go upon something which fell within the clause of the contract which I have read. That clause is not itself a contract of submission; it is really a contract to submit; but it is only a contract to submit the question arising on section 3, namely, the question of demurrage. Accordingly all that the committee could decide was the question of demurrage as put before them. The parties then, as a shorthand way of making their claim, sent in a copy of the claim as made in the actions. I think the effect of that was as clear as day; it was to tell this committee of arbiters that what they wanted in the case of the "Alga" was 116 hours at fourpence per ton per hour, or £141, 9s. 1d. It could not submit to the arbiters the question of whether interest would be due in the Court of Session after the date of citation. It might have been perfectly possible to make a claim to the arbiters that interest was due upon the sums of demurrage if there was a good legal

ground for that claim, but I cannot myself see that there could have been good legal ground for the claim, because a sum due for demurrage is not within that very limited class of debts on which interest runs. It is a familiar rule that interest is not due on a debt unless it is either due on express contract or by statute or by recognised practice, and that in all other cases you can only get interest after demand. While that might have been so, it obviously was not the case here, because when the pursuer came into Court he never proposed to ask for interest upon the demurrage as from the date; he merely made the ordinary demand that a person makes in an action, which demand—namely, interest after the date of citation—is a perfectly good demand even although no interest is due upon the debt as before citation. It seems absolutely clear that there was not and could not be submitted to this committee of arbiters any question of interest at all.

But I think it is equally clear, from the mere fact that they were acting as arbiters, that they had an inherent power of dealing with the expenses of the proceedings before them, although nothing was said about it in the contract to submit, and nothing was said about it in the letters by which they were asked to act, and by which they were asked to take up the claim as made and as defined by the two summonses which were sent to them. It has been explained to us in the course of this case—and I have no doubt it is perfectly true—that these demurrage claims are very common; that it is very common in charter-parties to have a contract to submit of this sort; that the working out of it is a matter of everyday practice; and that as a rule there are no formal proceedings as in other arbitrations, including claims and condescendences and so on, but that what happens is that each of these parties who is chosen—that is to say, the shipowner nominated by the owners and the coal-shipper nominated by the charterers—does, as they put it, the best for his own side, and eventually they come to a conclusion, if they can, which is then issued as an award.

These parties met. I do not know that they actually met face to face at all, but they communicated by means of correspondence, and eventually they issued jointly a document bearing a double place of issue—Leith on 29th May, and Glasgow on 30th May—signed by both of them in these terms—"In the dispute *Pollich* v. *Heatley* the question of demurrage due to the steamers 'Alga' and 'Marina' has been submitted to the decision of the signatories. After careful investigation into all the circumstances we find due to Alga' 104 hours, and to 'Marina' 198 hours, or £126, 17s. 11d. and £247, 8s. 4d. respectively—a total demurrage of £374, 6s. 3d. We award accordingly." Then there is a note as to some of the facts on which they arrive at that conclusion.

That award having been obtained, the shipowner through his agent took it back, so to speak, to the original process in the actions; and then we are told by the Lord Ordinary in this action, to which I have not as yet referred, what happened. What happened was this. The pursuers in the action asked the Lord Ordinary to recal the sist and then to proceed to decern for this sum of £374, 6s. 3d., but they also asked him to decern, first of all, for interest upon that sum from the date of citation, and, secondly, for expenses both of the arbitration and of the process; and we are told that the Lord Ordinary said that so far as those two latter demands were concerned he did not see his way to grant them. I say we are told so, because the Lord Ordinary did not write upon that matter; and accordingly the interlocutor sheet in the action, so far as it goes, because it is not yet finished, does not bear any trace of that motion. At any rate the Lord Ordinary seems to have given out his views to that effect, because the next move of the pursuers was that they asked the Lord Ordinary to remit to the arbiters to deal first of all with the question of interest, and secondly with the question of the expenses of the arbitration; and that motion was refused by the Lord Ordinary, and that refusal is embodied in an interlocutor. Before the Lord Ordinary was asked to write again (and here I think there really was a slight informality, because all this time the sist had never been recalled; however, that is neither here nor there)—I say before the Lord Ordinary was asked to write again, acting seemingly on an unfortunate hint that the Lord Ordinary had given, the pursuers raised this action of reduction, and that is the action before your Lordships.

Now the action of reduction proposes to reduce an award in their own favour of £374, 6s. 3d.—an award against which they say nothing upon the merits; but confessedly they want to get rid of it in order that they may be able to institute proceedings *de novo* before another committee or before the same committee, and in these new proceedings get this question of interest and this question of expenses disposed of. I am bound to say that I have never quite been able to understand how, if the pursuers succeeded, this was going to be an entire success to them; because supposing they did get rid of this award—and I will even assume that they could begin new proceedings, and that in these proceedings they could get the expenses of these proceedings and interest—how in the new proceedings they were ever to recover the lost expenses of the old proceedings passes my comprehension. How the new committee could ever have power to deal, not only with the expenses caused before them, but with those caused formerly—it might be before another body of arbiters or it might be before themselves, it does not matter which—in an arbitration which had been reduced and rendered abortive is what I have never been able to see.

At any rate here is the action, and the action was brought before the same Lord Ordinary. There was a discussion in the procedure roll before the Lord Ordinary,

because the defender pleaded that the action was incompetent. The Lord Ordinary pronounced an interlocutor on 13th March 1909, to which he adhibited an opinion and in which he allowed the pursuers a proof of their averment—the averment of which he allowed proof being that in these arbitration proceedings there had been submitted to the arbiters the question of interest, and that there had been submitted to them the question of expenses. The gist of the Lord Ordinary's opinion is that it is one of the few but yet recognised grounds of reducing a decreet-arbitral to say that the arbiter has not exhausted the submission, and that it was impossible for him to say here whether the submission had not been exhausted without first finding out whether *de facto* there had been put before the arbiters these two questions. Accordingly proof was allowed, and that proof having been taken the Lord Ordinary had to give his judgment upon the merits, and his judgment upon the merits was that these questions had been submitted to the arbiters. There was no doubt, of course, that the arbiters had not decided them, because that is plain enough by the terms of the award which I have already read. He held that they had been submitted, but he held that they had been submitted upon different grounds in respect of the expenses, and in respect of the interest. He considered that the interest had been submitted because he held that the putting in of the records in the actions, to serve as claims in the arbitration, submitted not only the question of the sums concluded for, but also the question of the conclusion for interest after citation.

With great respect to the Lord Ordinary I think that is an erroneous idea, and I think it is an idea that arises out of a confusion between a judicial reference of the action and a reference which does not depend upon the action at all, but which depends upon a contract. The contract in the charter-party was, that instead of the amount of demurrage being found out by the courts of the country, it should be found out by a certain informal tribunal. But there was no contract—and really there could not be a contract—to the effect that that informal tribunal was to decide whether the courts of the country, if an action were brought before them, should or should not allow interest after citation upon the sum sued for. That is a business with which the courts alone can have to do. Therefore so far as interest is concerned I think that was obviously a mistake of the Lord Ordinary.

So far as the expenses of the arbitration are concerned, there was not produced any document which was submitted to the arbiters as a tribunal at all asking them to deal with these expenses. Practically the Lord Ordinary's view came to this. He found in the communings between the arbiter appointed by the pursuers and the law agent of the pursuers certain sentences which show that the law agent contemplated that the arbiter would take up the matter of expenses; and he also found that there had been certain communings between the agents on the one side and those on the other which show that in the minds of both agents it was present as a probable fact that expenses might be asked for; and from those two things the Lord Ordinary has held that the question was submitted.

I am bound to say, if I were disposing of the case on the evidence, I should come to an opposite conclusion from that of the Lord Ordinary. If you are going to say that something has been put before these people sitting as a tribunal, and that that something has not been dealt with, you must show that it was put before them both—I do not mean to say in the same room, but it must actually have been put before them both. There is no doubt that in this informal arbitration the position of the arbiters is really very peculiar. It is so peculiar that I rather understand either one or both of your Lordships are inclined to think that "arbiters" is not the proper name for them. But I think it remains an arbitration, although no doubt the arbiter on each side is a man in a double position; he partly acts as an agent for his own client, or at any rate as a person appointed by him, and partly as an arbiter. I do not think that the arbitration is vitiated by that; but I think it makes it absolutely impossible to hold that everything that is done between one of the law agents and his own arbiter—necessarily behind the backs of the other people—is *ipso facto* something done by the tribunal. Accordingly if it were merely upon evidence I should hold here that it was quite clear as matter of fact that the matter of expenses had never been submitted to these two arbiters. There is no question it never was submitted to the arbiter for the defender, who says so perfectly plainly.

I am bound to say that in the evidence given by Mr France you find really the key to the whole thing that happened. He says he has experience of these arbitrations and has never heard anything about expenses, because as a matter of fact there is almost no expense caused except the amount of the fee, which is easily arranged. He says perfectly frankly that he should consider himself entitled to deal with expenses, but that he never heard of expenses in this matter at all. I think that is really the key to the situation here. Nobody at first expected the expenses to be dealt with, and it was only afterwards that it turned out that the expenses here were more than usually heavy, and that accounts for the pursuers not having brought the matter up sooner.

On the evidence, as I have said, I should come to an opposite conclusion from the Lord Ordinary; but really the ground upon which I would sooner put my judgment is a perfectly different one, and it is one which, if it had been taken sooner, would have precluded a proof altogether. I have already disposed of the question of interest, and that leaves only the question of expenses. I know of no case where a decreet-arbitral, quite regular in every other re-

spect, is allowed to be reduced simply and solely because it does not on the face of it deal with expenses. There is not much law on the question, but the law, such as it is, is clearly enough laid down. There is a chapter upon it in Mr Montgomerie Bell's well-known work on arbitration (book iii, chapter 10), and there is a case which is the leading case on the subject—*Paul* v. *Henderson* in 5 Macpherson 613 — and which may be referred to for the general principles on which this matter is disposed of. The idea that lies under it is this. Parties who go into a contract of submission oust themselves from their natural right of appeal to the tribunals of the country, and therefore it is only fair that when they do that they should be entitled to insist that the arbiters before whom they go will make a complete job, so to speak, of what is put before them. Accordingly where various disputes are submitted, and an award goes out, which is a final award, if that award does not deal with some of the matters submitted, then it cannot stand — even so far as it does deal with matters submitted — because it has not exhausted the submission. The matter of expenses is not part of the submission. There may be cases in which special power is given to an arbiter to dispose of expenses, but that really is pleonastic. The matter of expenses is incidental to the conduct of the case, and there is an inherent power in the tribunal to grant them, just as in this Court we are able to grant expenses even though there may be no conclusion for them. I cannot see how the fact that the question of expenses is not disposed of falls within the doctrine at all. I do not think it is a case of the submission not having been exhausted. It is merely that no expenses have been awarded.

Let me say another thing. I have no doubt that if a document was issued in the terms in which this document was issued, it would have been quite within the competency of the parties to go to the arbiters at once and say—"In this informal arbitration you do not seem to have taken up the matter of expenses, and we want you to do so before you issue a final award;" and it would have been perfectly competent for the arbiters to do so. They would not be *functi*, because it is not like the case of a formal submission and a formal decree-arbitral where the whole matter is concluded. The contract here was a standing contract under the charter-party, and there would still have been plenty of time to go back to the arbiters and ask them to deal with this matter one way or the other. But they did not do that. Instead of that they took away the award as a final award and went to the Court with it and made an incompetent motion.

I am afraid the result of all this is that I do not think this interlocutor of the Lord Ordinary should stand, for I do not think there is any ground here at all for reducing the decree as pronounced. But in order to save further proceedings if I can, I am bound to say that although I think these expenses of the arbitration are now no longer capable of being made available by any form of process, it seems to me quite otherwise with the interest as concluded for after the date of citation. The actions are still in Court before the Lord Ordinary, and the appropriate thing is to get a decree for the sum found due by the arbiters, and on a decree being asked for the interest from the date of citation till the date of payment I cannot see any answer to the demand. I am not clear whether the Lord Ordinary has ever refused this or whether there is not confusion as to the true meaning of interest. If the Lord Ordinary has refused it, I think he refused it upon the mistaken notion that the effect of the parties going before the arbiters was to submit a judicial case instead of merely a question under a contract. Accordingly I see no answer to a demand for interest upon the sum found due from the date of citation in the action. I say that in order if possible to prevent any further proceedings. The result at present is a very unfortunate one, because it is really wasted money all round. But I think it is quite clear that from this action of reduction the defender should be assoilzied.

LORD KINNEAR—I agree with the opinion of the Lord President, and as the reasons for which I am for recalling the Lord Ordinary's interlocutor and assoilzieing the defender are exactly those which your Lordship has stated, I do not desire to repeat them. I only make two observations in addition. My concurrence with the Lord President applies to what his Lordship has stated with reference to the peculiar position of the referees under this contract of submission, as well as to the rest of his Lordship's judgment. I quite agree that these referees were acting as arbiters, and that the process in which they were to give their award was a process of arbitration. My only other remark is that it seems to me that it would be a grave reproach to our procedure if this action, with all the costly procedure that has followed upon it, had been either necessary or maintainable. The only questions that were left open between the parties when they were inviting the arbiters' award are exceedingly simple, and might have been disposed of in an exceedingly simple process, as your Lordship suggests. I think it would be most unfortunate if we were to hold that an action of reduction and a costly proof, and then a new process before new arbiters, or before the same arbiters under a new reference, were necessary in order to settle the questions of interest and expenses.

LORD JOHNSTON—In its original conception the contract to submit, contained in section 3 of the charter-party, was not, I think, a contract to make a formal reference, but to make one which, looking to the nature of the questions which could arise under that section of the charter-party, was much more akin to a submis-

sion to valuators, such as was before the Court in *Nivison* v. *Howat* (1883, 11 R. 182), where it was held that no formalities were necessary, all that was really desired or bargained for being the opinion of skilled persons on the question in dispute. In the present case I think that the parties and the committee, to use the terms of the clause of the charter-party, have not even treated the matter as if it was such a submission, but have allowed it to degenerate into a commission of their dispute to two friendly intermediaries or seconds, with powers. As the committee have acted accordingly, the parties have got what they bargained for, namely, not really an award, but a settlement of their dispute, and evidently on very wise and sensible terms. Their dispute was one regarding demurrage under the charter-party, and not regarding interest under the summons; and there I think the matter should have taken end. In these circumstances I should myself have been prepared to hold that the pursuers were barred by their conduct in the submission from pleading any of the points raised in the present action; but if the proceedings with which we have to deal can be raised to the higher plane, even of a reference to valuators, I should entirely concur in the opinion which your Lordship has expressed and in the judgment which you propose.

LORD M'LAREN was absent.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Pursuers and Respondents—Anderson, K.C.—Kemp. Agents—Wylie, Robertson, & Scott, Solicitors.

Counsel for the Defender and Reclaimer—Murray, K.C.—W. T. Watson. Agents—Gordon, Falconer, & Fairweather, W.S.

Thursday, February 10.

FIRST DIVISION.

[Sheriff Court at Hamilton.

LEISHMAN *v.* WILLIAM DIXON LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (2) *c—Serious and Wilful Misconduct—Fact or Law.*

A miner in order to get a screw-key wherewith to repair a breakdown in the pit, the repair of which was a matter of some urgency, crossed the bottom of the shaft instead of going round by the "Boutgate" or by-pass provided for the purpose. The bottom of the shaft was about eight feet wide while the time taken by the cage to ascend to the top and descend was as a rule not less than three minutes and often more. The cage after leaving the pit-bottom was entirely under the control of the engineman, who sometimes, though rarely, had to stop and lower it again when caught in the shaft. The miner waited till he saw the cage leave the bottom and then proceeded to cross. In so doing he was caught by the cage, which the engineman had lowered, and he was severely injured. Though the "Boutgate" was never in practice clear of the general traffic of the mine, it was never so obstructed as to prevent a man easily passing through it. The shaft bottom was regarded as notoriously dangerous, and though there was no special rule prohibiting miners from crossing it, it was in practice never crossed unless the cage was in its seat.

In a claim by the miner for compensation under the Workmen's Compensation Act 1906, the arbiter found that the claimant had been guilty of serious and wilful misconduct and assoilzied the defenders.

Held that there was evidence on which the arbiter might properly find as he did, and appeal *dismissed.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) at the instance of John Leishman (*appellant*), miner, 11 Watson Street, Blantyre, against William Dixon Limited (*respondents*), coalmasters, Glasgow, the Sheriff-Substitute (THOMSON) at Hamilton assoilzied the defenders, and at the request of the claimant stated a case for appeal.

The *facts* as stated by the Sheriff-Substitute were as follows—"(1) That the appellant on 24th November 1908 met with an accident in the course of his employment with the respondents. (2) That on said date he was acting as emergency roadsman, and that a breakdown having occurred in a blind shaft from the ell to the splint coal, he went for a screw-key to screw up certain bolts. (3) That on account of said breakdown the whole pit was temporarily kept idle, and it was a matter of some urgency to have the breakdown repaired without undue delay. (4) That in order to get the key he went across the working shaft of the pit at the splint bottom, instead of going round by the passage after mentioned provided for the purpose. (5) That there is a circular passage called the 'Boutgate' or by-pass from one side of the shaft bottom to the other. (6) That the said 'Boutgate' is not reserved exclusively for the passage of men, but is often used to accommodate the general traffic of the pit, and as empty hutches on their arrival at the pit-bottom are marshalled in the said 'Boutgate,' and as they accumulate are hauled off into the workings by horses, which are backed into the 'Boutgate' to await the completion of a rake, and to be attached to said rake. (7) That the said 'Boutgate' was never in practice clear of said traffic of empty hutches, and that there were frequently horses in it. (8) That there were empty hutches standing in the said 'Boutgate' when the appellant went for the screw-key. (9) That when there are empty hutches in the said